IN THE SUPREME COURT OF THE STATE OF IDAHO
Supreme Court Docket No. 44746-2017

IN THE MATTER OF ACCOUNTING FOR DISTRIBUTION OF WATER TO THE FEDERAL ON-STREAM RESERVOIRS IN WATER DISTRICT 63

BALLENTYNE DITCH COMPANY; BOISE VALLEY IRRIGATION DITCH COMPANY; CANYON COUNTY WATER COMPANY; EUREKA WATER COMPANY; FARMERS' CO-OPERATIVE DITCH COMPANY; MIDDLETON MILL DITCH COMPANY; MIDDLETON IRRIGATION ASSOCIATION, INC.; NAMPA & MERIDIAN IRRIGATION DISTRICT; NEW DRY CREEK DITCH COMPANY; PIONEER DITCH COMPANY; PIONEER IRRIGATION DISTRICT; SETTLERS IRRIGATION DISTRICT; SOUTH BOISE WATER COMPANY; and THURMAN MILL DITCH COMPANY

Petitioners-Respondents,

v.

BOISE PROJECT BOARD OF CONTROL, and NEW YORK IRRIGATION DISTRICT,

Petitioners-Respondents,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his capacity as the Director of the Idaho Department of Water Resources,

Respondents-Appellants,

and

SUEZ WATER IDAHO, INC.,

Intervenor-Respondent.

IDWR APPELLANTS' REPLY BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding
Ada County District Court Case No. CV-WA-2015-21376
(Consolidated Ada County Case No. CV-WA-2015-21391)

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I. INTRODUCTION

This is a water distribution case, the outcome of which will determine whether Idaho's water will be distributed according to Idaho water rights and Idaho's prior appropriation doctrine, or according to decisions made by the Federal Government. The Ditch Companies and the Boise Project Board of Control ("Irrigation Organizations") argue for an outcome that gives the Federal Government control over when and how to distribute Idaho's water. This is the inescapable result of accepting the Irrigation Organizations' argument that their private agreements with the Bureau of Reclamation ("BOR") are binding on the Idaho Department of Water Resources ("Department"), all existing water right holders, and all future appropriators.

As more fully set forth below, this Court should reject these attacks upon Idaho's authority to distribute water under Idaho law. This Court can do so by: 1) affirming the District Court's determination that the "Accrual Methodology" is a proper application of Idaho's prior appropriation doctrine, and within the authority and discretion of the Director as he fulfills his statutory duty to distribute water in accordance with decreed water rights; 2) reversing the District Court's determination that Idaho law does not allow a water right holder to divert excess water ancillary to his water right provided there is no harm to other appropriators; and 3) reversing the District Court's remand to the Director for failing to make a determination that the Irrigation Organizations have acquired a constitutionally based water right in water the Water District 63 accounting system identifies as "unaccounted for storage."

II. ARGUMENT

The Irrigation Organizations' response briefs mainly attack the Water District 63 accounting system's "Accrual Methodology." The main question in this appeal, however, is whether the District Court erred in holding that the "Unaccounted for Storage Methodology" is contrary to law. *Opening Brief* at 4-5, 30. That said, the Unaccounted for Storage Methodology and the Accrual Methodology are not "separate and independent systems of distributing water," but rather "interrelated components of a single distribution system." *Id.* at 33. Thus, for context purposes, the Department addresses the Irrigation Organizations' attacks on the Accrual Methodology in Subsection A below.[1] In Subsection B, the Department addresses the Irrigation Organization's arguments regarding the Unaccounted for Storage Methodology.

A. The Accrual Methodology Is Consistent With the Decreed Storage Rights and Idaho's Prior Appropriation Doctrine.

The Department's accounting system distributes natural flow to water rights based upon their decreed elements. The Irrigation Organizations argue, however, when federal flood control operations require evacuation of storage space, they should be allowed to "refill" the evacuated space in priority. This argument is contrary to the storage contracts they voluntarily entered into

[1] The Irrigation Organizations in their separate appeals (Idaho Supreme Court Docket Nos. 44677-2016 and 44745-2017) argued that the Accrual Methodology is contrary to law. The Department therefore incorporates herein by this reference the Department's response briefs in the Irrigation Organizations' appeals. *IDWR Respondents' Brief* (Idaho Supreme Court Docket No. 44677-2016) (Aug. 1, 2017); *IDWR Respondents' Brief* (Idaho Supreme Court Docket No. 44745-2017) (Aug. 1, 2017).

with the federal government and amounts to a collateral attack on the Decreed Storage Rights.[2] Further, the Irrigation Organizations attempt to support this collateral attack by challenging the Director's comprehensive and well-supported factual findings.

1. The Irrigation Organizations' Private Agreements to Subordinate Their Storage Space Entitlements to Flood Control Operations Are Not Binding on the Department or Other Appropriators.

The Federal Government operates the Boise River Reservoirs for flood control and water storage purposes pursuant to federal inter-agency agreements, "Spaceholder"[3] storage contracts, and the *Water Control Manual for Boise River Reservoirs* ("*Water Control Manual*").[4] It is undisputed that the storage of water "is subordinate to flood control [operations]" carried out by the U.S. Army Corps of Engineers ("Corps"). *Respondents' Brief for the Ditch Companies* (Aug. 1, 2017) ("*DC Response*") at 50-51; A.R. 001239-48 (describing reservoir operations). The Corps' determination of when and how much reservoir space is "physically and legally

[2] The Decreed Storage Rights are water right nos. 63-303, 63-3613, 63-3614, and 63-3618. Partial decrees for these water rights were issued in the Snake River Basin Adjudication. AR. 001151-52.

[3] "Spaceholders" are water delivery entities (such as irrigation districts and canal or ditch companies) that have contracts with the federal government for "water storage space in the reservoir in return for the repayment of a proportional share of the construction costs." *Kerner v. Johnson*, 99 Idaho 433, 438, 583 P.2d 360, 365 (1978); *see* A.R. 001237 ("irrigation organizations that have contracted for storage in the reservoir system").

[4] The Federal Government also operates the Boise River Reservoirs for other purposes, such as recreation, streamflow maintenance, municipal and industrial, power generation, and fish and wildlife objectives. Reservoir operations are also subject to a variety of requirements established by federal laws such as the Endangered Species Act. Some but not all of these operations and objectives are documented in the *Water Control Manual.* A.R. 001246.

available" for the storage of water, *DC Response* at 18, 22, is binding on the Spaceholders pursuant to their storage contracts.

No one forced this arrangement on the Irrigation Organizations. To the contrary, they agreed to subordinate their reservoir space entitlements to flood control operations through storage contracts executed in connection with Lucky Peak Reservoir, a Corps flood control project. Arrowrock and Anderson Ranch Reservoirs were authorized pursuant to federal Reclamation Acts, primarily to store water for irrigation pursuant to state law.[5] When Lucky Peak was authorized pursuant to the 1946 federal Flood Control Act, the Corps and the BOR proposed coordinating Lucky Peak operations with those of the BOR's two water storage reservoirs, Arrowrock and Anderson Ranch, so that all three would be used for ***both*** flood control and water storage. Despite the BOR's assurances that flood control and water storage were "complementary rather than competitive," *DC Response* at 5, 36, Arrowrock and Anderson Ranch Spaceholders feared that the proposal "might jeopardize the storage of water for irrigation." Ex. 2053 at 001644. Therefore, they agreed to make their storage entitlements subject to flood control operations only after securing an express contractual "Guarantee" from the BOR that Lucky Peak storage would be made available to Arrowrock and Anderson Ranch

[5] Arrowrock was authorized exclusively for irrigation storage, and Anderson Ranch was authorized primarily for irrigation storage. Flood control was included as an authorized purpose of use of the Anderson Ranch project so that construction costs could be allocated in part to flood control, which reduced the Spaceholders' repayment obligations. Ex. 2053 at 001633, 001639-40.

Spaceholders in the event their storage space failed to fill as a result of flood control operations.[6] *DC Response* at 8; A.R. 001240; *see* Ex. 2053 at 001644 ("a sort of trade: extra water from Lucky Peak for the irrigators in exchange for allowing storage space in Arrowrock and Anderson Ranch to be used for flood control."). As the Snake River Basin Adjudication ("SRBA") District Court held in 2008, the BOR's 1954 "Guarantee" to Arrowrock and Anderson Ranch Spaceholders means they have an "interest [in Lucky Peak] for flood evacuation that is paramount to all other rights to storage in LuckyPeak[.]" Off'l Not\63-3618\20080923_Memorandum Decision and Order on Cross-Mtn for SJ at 001565.

Lucky Peak Spaceholders were (and remain) in a position fundamentally different from that of Arrowrock and Anderson Ranch Spaceholders. Unconditional subordination to flood control operations has always been a non-negotiable condition of Lucky Peak storage contracts, because flood control is the "primary" purpose of Lucky Peak Reservoir. A.R. 001238; Off'l Not\63-3618\20080923_Memorandum Decision and Order on Cross-Mtn for SJ at 001544, 001564; Ex. 2112 at 002310-11. No guarantees were made to Lucky Peak Spaceholders, and they contracted for storage in that reservoir with full knowledge that their storage entitlements are subject to flood control operations and the BOR's "Guarantee" to Arrowrock and Anderson Ranch Spaceholders.

[6] The Spaceholders' repayment costs and O&M charges were re-allocated so they would not bear the financial burden of "nonreimbursable" flood control operations. Ex. 2071 at 001928, 001931; *see* Ex. 2100 at 002171 (contract referring to cost allocation report).

In short, the BOR and the Spaceholders allocated the benefits and burdens of flood control operations through contracts that subordinate the Spaceholders' storage space entitlements to the Corps' determinations of when reservoir space is "physically and legally available" for water storage. This is consistent with this Court's holding in *United States v. Pioneer Irrigation District* that, while the BOR manages the storage facilities, the "title to the use" of the stored water is held by the "consumers or users" of the water. 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). Thus, as co-owners of the Decreed Storage Rights, the BOR and the Spaceholders were free to enter into contracts allocating the risks of flood control operations. The contracts between the BOR and the Spaceholders are private agreements that bind only the BOR and the Spaceholders, however, and cannot be enforced against other appropriators. *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184, 1191 (2017) ("the Settlement Agreement is a private agreement between private parties. [The Department] is not a party to the Settlement Agreement. As such, the Director is not bound by the Settlement Agreement and has no duty to enforce the Settlement Agreement").

2. The Irrigation Organizations' Challenges to the Accrual Methodology Are Collateral Attacks on the Decreed Storage Rights and Direct Attacks on Priority-Based Administration.

The Irrigation Organizations assert the Accrual Methodology[7] is contrary to law because under the so-called "reservoir operating plan,"[8] and in particular the *Water Control Manual*, reservoir space prioritized for flood control purposes "is not available to store water for irrigation use or any other purpose." *DC Response* at 8. Thus, the Irrigation Organizations argue, water released for flood control purposes "is not 'physically or legally available' for beneficial use storage" and cannot "'fill' or 'satisfy' the existing storage rights." *Id.* at 22. The Irrigation Organizations conclude the Decreed Storage Rights may not be deemed satisfied and must remain "in priority" until federal flood control operations have ended, and the reservoirs reach "maximum fill." *See, e.g.*, *BPBOC Response* at 3-4, 8; *DC Response* at 8, 12.

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[7] The Department uses a computerized accounting system in distributing water in Water District 63, and the Accrual Methodology is largely defined by algorithms coded into the computer program. A.R. 001258-70. "Reduced to its most basic operation," the Accrual Methodology "determines that an on-stream reservoir's storage right is 'satisfied' when the quantity of natural flow diverted by the reservoir in priority equals the total quantity authorized by that reservoir's decreed storage right." A.R. 001293.

[8] The term "reservoir operating plan," as used by the Irrigation Organizations, refers to miscellaneous federal reports, inter-agency agreements, storage contracts, reservoir operations manuals, and various other documents collected by the Irrigation Organizations' historian. R. 001063; *see* Ex. 2053 (historian's report). The Irrigation Organizations' theory of the case is that the so-called "reservoir operating plan" governs water distribution and water rights administration in the Boise River Basin. *See DC Response* at 3 (asserting that the "reservoir operating plan" is essential to "determining when the storage rights are 'satisfied.'"). The Director made extensive factual findings on this question that included analysis of the historian's report and testimony. A.R. 001238-57, 001271-77.

The short and fully dispositive answer to these arguments is that they are impermissible collateral attacks on the Decreed Storage Rights. As this Court held in Basin-Wide Issue 17, "the Director's duty to administer water according to technical expertise is governed by water right decrees," and "the decrees give the Director a quantity he must provide to each user *in priority*." *In re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho at 394, 336 P.3d 792, 801 (2014) (emphasis added). There is nothing in the partial decrees that authorizes the Director to distribute water to the Decreed Storage Rights based on if, when, or how much reservoir space is "physically or legally available" for the storage of water under the *Water Control Manual*, or any other component of the so-called "reservoir operating plan." R. 001056, 001063; A.R. 001234-36, 001290, 001301; Ex. 2015.

The Irrigation Organizations' argument that the Decreed Storage Rights must nonetheless be interpreted or administered on the basis of this private agreement is a collateral attack on partial decrees issued in the SRBA. *See Rangen v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2015) (holding that any interpretation of partial decrees "that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments" and constitutes "an impermissible collateral attack on the decrees"); *IGWA v. IDWR*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016) ("Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process."). As the Director correctly concluded, Idaho law "does not permit the Director or the watermaster to modify the decreed elements of the reservoir water rights by interpreting or administering the water rights to effectuate federal flood control operations that were not decreed

and that are admittedly independent of the water rights system and prior appropriation." A.R. 001303.

The Irrigation Organizations' argument that the Director should not "count" water released for flood control purposes when reservoir space is not "physically or legally available" for the storage of water under the *Water Control Manual* is contrary to the Director's "clear legal duty" under Idaho Code § 42-602 to distribute water. *BWI-17*, 157 Idaho at 393, 336 P.3d at 800. The question of whether water is "physically and legally available" for distribution is determined by water right decrees, *id.* at 394, 336 P.3d at 801, not private agreements between the co-owners of a storage water right prioritizing the use of reservoir space. *City of Blackfoot*, 162 Idaho at 308-09, 396 P.3d at 1190–91.

The Irrigation Organizations' argument that flood control releases should not "count" also would require the Director to ignore that, at each dam, ***all*** flows are physically diverted into the reservoir, including "the entire flow of the river that is available in priority at any given time," R. 001061, and "become subject to controlled releases" by the Corps and/or the BOR. A.R. 001238; *see* A.R.001281, 001292, 001294 (same or similar). The Corps and the BOR have exclusive control of the dams and reservoirs, and during the three flood control periods (winter, spring evacuation, and refill) water is released at the discretion of the Corps based on its evaluation of flood risks. *See* R. 001060 ("it is the federal government that operates the subject dams . . . . it is the federal government that decides how to store and release that water"); A.R. 001241-47 (describing federal flood control operations). The reality is that during the flood control season the BOR and the Corps purposefully divert, regulate, and control all flows.

The BOR does not, however, make daily determinations of the amount released for each purpose, but rather makes a retrospective accounting of the purposes of the releases at the end of the flood control season. A.R. 001246.[9] Moreover, "[e]ven when the BOR makes an initial, in-season determination of when and/or how much water was released for 'flood control,' that determination is often changed or amended later." A.R. 001301. "[T]he BOR can chose to account for such releases as 'flow augmentation'—which[,] unlike flood control releases[,] the BOR does not 'charge' against spaceholder storage allocations," and also to "make after-the-fact changes to its initial determinations of whether water was released for 'flood control,' 'flow augmentation,' or 'beneficial use.'" A.R. 001407 n.4.[10] Thus, "[i]t may be months before [the Director] knows whether that water was released to the irrigators or released for some other purposes." R. 001062.

[9] Contrary to the assertions of the Irrigation Organizations, it cannot simply be assumed that all releases during the flood control season are "flood control releases," or that they go unused. As the Director found, releases during the flood control season often serve multiple purposes simultaneously, including flood control, irrigation, power generation, streamflow maintenance, ESA flow augmentation, or dam safety and maintenance. A.R. 001245-46. The BOR's retrospective accounting of the purposes for which water was released during the flood control season is not part of the Water District 63 accounting system, is based in part on data and procedures not described in the *Water Control Manual*, and may or may not be communicated to the Department. *Id*.

[10] A failure to physically "refill" the reservoirs in flood control years does not mean the BOR cannot fill Spaceholder storage accounts because a considerable volume of the reservoirs' total storage capacity is held by the BOR rather than the Spaceholders. A.R. 001237-38. Thus, the question of whether Spaceholders will receive full storage accounts when flood control releases result in a "failure to fill" hinges upon whether the BOR decides to categorize releases as being for "flood control" or for some other purpose.

Water rights cannot be administered retrospectively, however. The Director determined that "[m]aking priority distributions contingent on such post-hoc determinations would preclude real time priority administration." A.R. 001301; *see* A.R. 001417 (similar). The District Court agreed, stating that determinations of whether and how much water is released for flood control purposes are "made by the federal government," and "the Director has no way of knowing whether water he distributes to the dams will ultimately be released to irrigators, or whether it will be released for some other purpose." R. 001061. The District Court found that "the Director may learn where the water went well after the fact," but "that is not meaningful in light of his statutory duty to distribute water in real time[.]" *Id*. The District Court concluded that making water distribution contingent upon the purposes for which water is released from the reservoir system "would cripple the Director's ability to effectively distribute water under our system of water rights administration" and "would effectively transfer water right distribution in the basin from the Director to the federal government." R. 001062.[11] But this is precisely what would result if the Irrigation Organizations' challenges to the Accrual Methodology were to be

[11] Under Idaho Law, "control" of the distribution and allocation of Idaho's water "shall be in the state," Idaho Code § 42-101, and the Director has exclusive authority over "direction and control of the distribution of water from all natural water sources within a water district." Idaho Code § 42-602. The Director can no more delegate his statutory authority to distribute water to the Federal Government than the Legislature could delegate to the Federal Government its authority to determine the scope of the SRBA. *See In re Snake River Basin Water System*, 115 Idaho 1, 5, 764 P.2d 78, 82 (1988) ("This Court has held that '[t]he legislature cannot delegate its authority to another government or agency in violation of our Constitution.'"); Idaho Const. Art. XV § 1 ("The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.").

accepted—and *exactly* the same problem would result if the District Court's rejection of the Unaccounted for Storage Methodology is affirmed, as subsequently discussed herein.

3. The Director's Factual Findings and Inferences Are Binding in This Appeal.

The Irrigation Organizations purport to "correct[] and supplement[]" the record, *BPBOC Response* at 2, by presenting self-serving factual narratives that often directly conflict with the Director's comprehensive and detailed factual findings. *See, e.g., DC Response* at 4-20 (discussing "Boise River Operations for Flood Control and Beneficial Use Storage," "Boise River Storage Water Right Administration," and "IDWR's Boise River Water Right Accounting System."). This is a judicial review proceeding pursuant to the Idaho Administrative Procedure Act ("IDAPA"),[12] however. The Director's factual findings are, as a matter of law, the required starting point for evaluating the Irrigation Organizations' arguments.[13]

The contested case from which this appeal arises was initiated to address and resolve "concerns with and/or objections to" how the Water District 63 accounting system determines when the Decreed Storage Rights are satisfied. R. 001053; A.R. 001230. The contested case raised a number of factual questions that were fully developed in the voluminous Agency

[12] Idaho Code §§ 67-5201—67-5292.

[13] Contrary to the Irrigation Organizations' arguments, the "Statement of Facts" in the Department's opening brief does not constitute the Director's "Findings of Fact." Rather it is a summary that is based on (and cites to) the Director's factual findings. *See* A.R. 001234-86 ("Findings of Fact"). The Director's factual findings are supported by citations to the Agency Record.

Record,[14] and resolved by the Director in detailed and comprehensive "Findings of Fact." A.R. 001234-86. The Director also issued a thirty page *Order Denying Petitions for Reconsideration*, A.R. 001401-31, which set forth twenty-one pages of additional factual analysis addressing the Irrigation Organizations' requests for extensive revisions of the "Findings of Fact." A.R.1403-17, 001423-30. The Director's "Findings of Fact" and analysis of the Irrigation Organizations' requests for revisions to the "Findings of Fact" address all of the subjects that the Irrigation Organizations purport to explain to this Court in their response briefs, such as:

- the physical setting, history, and construction of the Boise River Reservoirs;
- the federal agency agreements, reservoir operations manuals, and Spaceholder storage contracts that govern reservoir operations;
- the current and historic operation of the reservoirs for flood control purposes and for water storage purposes (including but not limited to the use of runoff forecasts and flood control "rule curves" to "balance" or "optimize" the often conflicting purposes);
- the Department's 1974 flood control report;
- the Corps' 1985 *Water Control Manual*;
- the administration of the reservoir water rights before the Water District 63 accounting system was implemented in 1986;
- the implementation of the Water District 63 accounting system;
- the structure and operation of the Water District 63 accounting system;
- the interpretation of computerized accounting system reports and printouts, such as the "green bar sheets";
- the administration of the reservoir water rights after 1986;

[14] The Agency Record (including the transcripts, exhibits, and officially noticed documents) exceeds 28,000 pages. *Memorandum in Support of Motion for Leave to File Overlength Brief* at 3 (Idaho Supreme Court Docket No. 44746-2017) (Apr. 26, 2017).

- the credibility and/or reliability of the testimony of former Watermaster Lee Sisco;
- how administration under the Water District 63 accounting system compares with pre-1986 administration and with reservoir operations as described in the *Water Control Manual*;
- the assertions that the Water District 63 accounting system creates barriers to water use and/or conflicts with the *Water Control Manual*;
- the alternative accounting proposals;
- the potential for future appropriations to interfere with the Decreed Storage Rights and/or reservoir operations;
- the economic and in-stream flow impacts of the Water District 63 accounting system.

A.R. 001234-86, 001401-30.

The Director's detailed factual findings cited and discussed a wide range of documentary evidence, expert reports, and witness testimony (both factual and expert testimony). In addressing factual questions, the Director had to interpret and weigh technical evidence and testimony. *See, e.g.*, A.R. 001242-47 (discussing federal flood control operations); A.R. 001264-71 (discussing operation of the computer programs); A.R. 001409-14 (discussing the "green bar" sheets).[15] The Director also had to draw inferences and weigh documentary evidence and/or testimony in resolving factual conflicts or inconsistencies. A.R. 001249-57, 001271-75, 001403-15, 001423-30. This was entirely appropriate. Idaho statutes and the decisions of this Court

[15] The Director's "Findings of Fact" contradict the Ditch Companies' baseless assertions that the Director's orders "do not pertain to any water measurement, hydrology, or engineering principles," *DC Response* at 27, but rather were only "a legal property rights determination" based exclusively on "abstract legal theories" and "uninformed by the actual operation of the Boise River Reservoirs for beneficial use storage and flood control" or "actual administration and use of storage water rights in Water District 63." *Id.* at 28-29.

authorize the Director to act as factfinder in questions of water distribution—indeed, they require it. *See* Idaho Code § 67–5279(1) ("The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact[.]"); Idaho Code § 67-5279(3) ("the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are . . . . not supported by substantial evidence on the record as a whole."). As this Court stated in Basin-Wide Issue 17:

> [T]he state engineer is the expert on the spot, and we are constrained to realize the converse, that judges are not super engineers. The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state, and we must extend to his determinations and judgment, weight on appeal.

BWI-17, 157 Idaho at 394, 336 P.3d at 801 (citation omitted; brackets in original).

The Director's factual findings and inferences are supported by substantial evidence in the record and thus, as this Court has repeatedly held, "are binding" on appeal. *See City of Blackfoot*, 162 Idaho at 306, 396 P.3d at 1188 ("'the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.'") (citation omitted); *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016) (same); *IGWA v. IDWR*, 160 Idaho 119, 125, 369 P.3d 897, 904 (2016) (same); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012) (same).[16]

[16] The Board of Control's incomplete recitation of the IDAPA standard of review fails to acknowledge the deference required to the Director's factual determinations. *BPBOC Response* at 21. The Ditch Companies simply ignore the IDAPA standard of review altogether, and incorrectly characterize this case as an appeal of an SRBA decision "that Treasure Valley

4. The Irrigation Organizations' Factual Assertions and Arguments Conflict With the Director's Factual Findings.

Many of the Irrigation Organizations' factual assertions and arguments directly conflict with the Director's factual findings. Further, their factual assertions that are consistent with the Director's findings often are inextricably intertwined with related or corollary assertions that directly conflict with the Director's findings.[17] As a practical matter it is not possible to

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irrigation districts and canal companies are entitled to additional water rights." *DC Response* at 1.

[17] One notable example is the Irrigation Organizations' assertions regarding the relationship between the allocation of water to Spaceholder storage accounts and the distribution of water pursuant to the Decreed Storage Rights. The Irrigation Organizations correctly state that all of the water physically stored in the reservoir system on the "day of allocation," including any "unaccounted for storage," is allocated to Spaceholder storage accounts through the "storage program." *DC Response* at 17-18. This assertion is consistent with the Director's findings. A.R. 001264, 001267-69, 001270-71, 001274-76; *Opening Brief* at 24-25. But the Irrigation Organizations' corollary assertion that the allocation of water to Spaceholder storage accounts "confirms that reservoir storage rights are filled"—i.e., satisfied—only when "inflows physically fill reservoir storage spaces," *DC Response* at 17, directly ***conflicts*** with the Director's factual findings. The Director specifically found, based on substantial evidence in the record, that a Decreed Storage Right is deemed satisfied and no longer in priority when cumulative accruals reach the decreed annual volume limit, regardless of "the physical fill or contents of the reservoir." A.R. 001266, 001409. The Director also found that distributing natural flow to the Decreed Storage Rights and allocating stored water to Spaceholder storage account are separate operations. *See, e.g.*, A.R. 001264-70 (discussing and distinguishing the "Water Right Accounting Program" and the "Storage Program"); A.R. 001425 ("Contractual storage allocations do not determine priority distributions to the reservoir water rights."); Ex. 5 at 000101 ("The Accounting Program only accounts for the fill of the reservoir storage right. The Accounting program does not calculate the amount of storage that accrues to individual space entitlements.").

adequately address in this reply brief all of the Irrigation Organizations' incorrect factual assertions and arguments.[18]

That said, the Irrigation Organizations' two central assertions are: (1) that until 2012, the Decreed Storage Rights had universally been interpreted and administered as not being satisfied, and therefore as remaining "in priority," until the reservoirs physically filled, or at least reached "maximum physical fill,"[19] *BPBOC Response* at 8, 15; *DC Response* at 8, 19; and (2) that as a result of its alleged central role in developing the "reservoir operating plan," the Department is legally bound to administer the Decreed Storage Rights in conformance with the flood control plan of the *Water Control Manual*. *BPBOC Response* at 11-12, 40; *DC Response* at 5-7, 15-16, 39, 57. The Director's factual findings directly contradict these two central assertions.

a. The Director Found That the Decreed Storage Rights Have Never Been Interpreted or Administered as Being "In Priority" Until the Reservoirs Physically Fill With Water.

With respect to the Irrigation Organizations' assertion that until 2012 the Decreed Storage Rights were always interpreted and administered as being "in priority" until the reservoirs filled, the Director found "that in years prior to 1986 [the first year the Water District

[18] The Director already addressed the same or similar arguments in the *Final Order*, A.R. 001230-1308, and the *Order Denying Petitions for Reconsideration*. A.R. 001401-31. A careful review of the Director's *Final Order* and *Order Denying Petitions for Reconsideration* is necessary to fully evaluate all of the Irrigation Organizations' many factual assertions and arguments in this appeal.

[19] The alleged significance of the year 2012 is the Irrigation Organizations' contention that the Water District 63 accounting system was "changed or re-interpreted in 2012 to subordinate the reservoir water rights and/or to provide that flood control 'refill' occurred without a water right." A.R. 001274-75.

63 accounting system was used] the water rights for the federal on-stream reservoirs were rarely if ever administered in priority at any time during the year." A.R. 001257 (text in brackets added). The Director also found that the Water District 63 accounting system deems the Decreed Storage Rights to be "in priority" only until "cumulative accruals have reached the reservoir water right's annual volume limit," regardless of flood control operations and regardless of whether the reservoir has physically filled. A.R. 001266, 001409; *see* A.R. 001280 (discussing Ex. 1019).[20] The Director further found that "no significant changes" to the Water District 63 accounting system were made or proposed in 2012, A.R. 001274, and that "[f]or all practical purposes, the current procedures are the same as those implemented in 1986." A.R. 001275.

b. The Director Found That the *Water Control Manual* Has Never Defined Priority Administration of the Decreed Storage Rights.

With respect to the Irrigation Organizations' assertion that the Department is legally bound to administer the Decreed Storage Rights in conformance with the "reservoir operating plan," the Director found, and the District Court agreed, the Department is not a signatory to any of the federal agency agreements, storage contracts, or reservoir operation manuals that comprise the so-called "reservoir operating plan." R. 001063; A.R. 001238-41. The Director further

[20] "Accruals" are not the same thing as "inflows." As the Director explained: "Accruals are a 'computed number based on the reach gain equation that counts toward the water right for that particular reservoir when it's in priority.'" A.R. 001266 (quoting Sutter testimony). Thus, "computed accrual is 'not an amount of water you can actually measure,' such as reservoir inflow, but rather is a 'calculated' quantity" that "is obtained by summing a series of physical measurements." *Id.* (quoting Sutter testimony).

found that the Corps and the BOR did the vast majority of the work on the *Water Control Manual*, with minimal Department involvement. A.R. 001241, 001424-25.

The Director found that the *Water Control Manual* "recognizes a distinction between state water right administration, and federal reservoir operations and contract administration." A.R. 001241. The Director also found that the *Water Control Manual* "does not state or imply that reservoir system flood control operations govern the distribution of water under state water rights and state law," that it "has not been interpreted as defining or governing water rights, water distributions, or priority administration," and that "state and federal officials have consistently viewed reservoir system flood control operations and state water rights administration in Water District 63 as distinct and separate matters." A.R. 001277.

c. The Director Considered All the Evidence and Testimony, Including but Not Limited to That Cited by the Irrigation Organizations.

The Director, in making his factual findings, considered the evidence upon which the Irrigation Organizations rely in constructing the factual narratives in their response briefs, such as the testimony of the Water District 63 watermasters, the Department's 1974 report on Boise River flood control operations, and the report of the Ditch Companies' historian, Dr. Stevens. A.R. 001253-57, 001272-74, 001403, 001405-07.[21] The Director also considered other evidence

[21] Contrary to the Ditch Companies' contention that the Director disregarded the testimony and/or affidavits of Robert Sutter (the author of the accounting programs), *DC Response* at 33, the Director's orders frequently cite Sutter's testimony and affidavits. Sutter was the only witness with personal knowledge of historic water rights administration in Water District 63 who also had personal knowledge of the development of the 1974 flood control report, and the *Water Control Manual*, and the Water District 63 accounting system. Sutter disagreed with the Irrigation Organizations' assertions that his 1974 Report was "the basis" for developing the

and testimony relevant to the same matters, rather than limiting his analysis to the narrow range of evidence and testimony upon which the Irrigation Organizations rely. *See, e.g.*, A.R. 001249-57, 001275-76, 001404-05 (discussing water right accounting and administration before 1986); A.R. 00-1258-71, 001275-76, 001408-12 (discussing the Water District 63 accounting system); A.R. 001271-75, 001405-06 (discussing water rights administration and accounting after 1986). The Director's factual findings and inferences are supported by substantial evidence in the record, and therefore "are binding" in this appeal. *City of Blackfoot*, 162 Idaho at 306, 396 P.3d at 1188; Idaho Code 67-5279(1); Idaho Code § 67-5279(3).

The Irrigation Organizations simply disagree with the Director's comprehensive factual findings and inferences, and ask this Court to rely instead upon the limited and self-serving factual narratives in their briefs. The Irrigation Organizations essentially assert that only the evidence and testimony they offered should be considered, that their interpretations of technical evidence[22] and of the weight and reliability of witness testimony should govern, and that factual

Manual, *see* A.R. 001424 ("'I don't think you should read too much into' the 1974 Report") (quoting Sutter), and testified that the Water District 63 accounting programs (which he wrote) "did not recognize a priority right to fill or 'refill' flood control space once a reservoir water right had 'filled on paper,' but obviously saw no inconsistency between his 1974 Report and the Water District 63 accounting programs." A.R. 001256. Sutter's testimony was also part of the basis for the Director's finding that the Department had very little involvement in developing the *Water Control Manual*. A.R. 001241, 001424-25.

[22] For instance, the Ditch Companies in a lengthy footnote attempt to prove that the "green bar" sheets—computer printouts generated by the accounting system—must be interpreted as meaning the Decreed Storage Rights "d[o] not fall out of priority" until the "physical contents" of the reservoirs reach "maximum physical fill." *DC Response* at 19 n.4. The Ditch Companies made the same argument in the contested case proceeding. A.R. 001334-36. The Director

disputes or inconsistencies the Director resolved in the contested case proceeding may be re-litigated *de novo* in this appeal. These arguments are contrary to Idaho law. The fact that the Irrigation Organizations cite evidence in the voluminous Agency Record that allegedly supports their narratives and assertions does not undermine the binding effect of the Director's factual findings.

d. The Irrigation Organizations' Factual Assertions and Arguments Ignore Substantial Evidence and Mischaracterize the Record.

The Irrigation Organizations' bid to re-write the factual record relies principally on the testimony and affidavit of former Watermaster Lee Sisco. The Irrigation Organizations essentially argue that Sisco's affidavit and testimony must be deemed controlling with respect to historic water rights administration in Water District 63 and the operation of the Water District 63 accounting system. *BPBOC Response* at 4, 12, 15; *DC Brief* at 9 n.3, 11, 13, 15, 18, 20, 31-34, 41-42, 44. They made the same argument in the contested case proceeding. *See, e.g.*, A.R. 001407 ("This argument reduces to the assertion that despite conflicts between the testimony of Sisco and others, and between Sisco's testimony and the documentary record . . . the Director should simply consider Sisco's testimony to be authoritative.").[23]

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carefully and fully explained why the Ditch Companies' interpretation of the "green bar" sheets is incorrect. A.R. 001408-14.

[23] The Ditch Companies' assertion that watermasters "are the true 'experts on the spot,'" *DC Response* at 28, 32, is contrary to this Court's decision in Basin Wide Issue 17, which reaffirmed an earlier holding that "'[t]he state engineer'"—that is, the Director—"'is the 'expert on the spot[.]'" *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801 (citation omitted). Idaho Code requires that the Director shall be a licensed civil or agricultural engineer, a registered geologist, or a hydrologist holding a hydrology degree from an accredited college or university, must have

The Director found that, on questions of water rights administration and operation of the Water District 63 accounting system, portions of Sisco's testimony conflicted with the documentary record and the testimony of other witnesses, including, notably, Robert Sutter and Elizabeth Cresto.[24] *Id.*; A.R. 001253, 001256-57, 001272-73, 001409. The Director found that Sisco's testimony did not support the Irrigation Organizations' assertions that the Decreed Storage Rights had always been interpreted and administered as being "in priority" during the "refill" period of flood control operations. A.R. 001249-57, 001271-75, 001277, 001405-07, 001409. The Director's factual findings on these questions are supported by substantial evidence in the record and are binding in this appeal. *City of Blackfoot*, 162 Idaho at 306, 396 P.3d at 1188.

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at least five years' experience in one of these professions, and be familiar with irrigation and water use practices in Idaho. *Id.* There are no such requirements to become a watermaster. Idaho Code § 42-605. Under Idaho Code, the Director has "broad powers to direct and control distribution of water." *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801. A watermaster, in contrast, is "a ministerial officer . . . authorized to distribute water only in compliance with applicable decrees," *Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972), is subject to the Director's supervision, Idaho Code § 42-602, and may be removed from office by the Director "whenever such watermaster fails to perform the watermaster's duty . . . ." Idaho Code § 42-605(9). In recognition of the Department's expertise in water right accounting, Sisco requested the Department's assistance in implementing computerized water right accounting in Water District 63. A.R. 001258.

[24] Robert Sutter is a former Department engineer, and the principal author of the Water District 63 accounting system computer programs, and of the Department's 1974 flood control report. A.R. 001256. Elizabeth Cresto is the Department's Hydrology section supervisor, has been responsible for the accounting programs since 2005, and wrote the "Staff Memorandum" describing the operation of the accounting system. A.R. 001246.

The Ditch Companies nonetheless argue this Court should reject the Director's factual findings because, allegedly: (1) the Sisco affidavit and one of the three Sutter affidavits show that they had the same "understanding" as the Ditch Companies of how the Water District 63 accounting system works; (2) Cresto was "naïve" about the operation of the accounting system and unqualified to "assess the fit between [the Department's] accounting system and reality"; and (3) the Department lacked "institutional knowledge" of the accounting system and flood control operations. *DC Response* at 11, 30, 33. These assertions are contrary to the record.

The Agency Record clearly establishes that Sutter agreed with Cresto rather than Sisco. Sutter testified that he agreed with the description of the Water District 63 accounting system in Cresto's Staff Memorandum (Ex. 1). Tr., Aug. 28, 2015, pp.321-26.[25] Sutter also testified that he clarified the affidavit upon which the Ditch Companies rely (Ex. 2181) through a second affidavit that the Ditch Companies have ignored (Ex. 6). Tr., Aug. 28, 2015, p.330, l.21-25. In his second affidavit, Sutter "concur[red] with the statements in [Cresto's] affidavit concerning water right accounting procedures." Exhibit 6 at 000106 *see* (Ex. 2) (Cresto affidavit). Cresto's affidavit, in turn, explained certain aspects of the accounting system addressed by Sisco's affidavit. Ex. 2 at 000017. Cresto's affidavit stated that "[s]ome of the statements in Mr. Sisco's affidavit are not consistent with the accounting operations and procedures of the Water District 63 water rights accounting program and the Water District 63 storage allocations program." Ex.

[25] Sutter further testified that his 2008 affidavit (Ex. 5) discussing operation of the Water District 63 accounting system (which the BOR had filed in the SRBA proceedings on the BOR's Lucky Peak water right claim) was still accurate. Tr., Aug. 28, 2015, pp. 326-27.

2 at 000017. Cresto's affidavit specifically stated Sisco's affidavit "incorrectly states that under the water right accounting program, a licensed or decreed water right remains in priority until the reservoir has physically filled, or until the reservoir system as a whole has reached 'maximum physical fill.'" *Id.* at 000020.

Moreover, Sutter testified that Sisco's affidavit "doesn't accurately portray how the accounting is done," and "at best it's misleading." Tr., Aug. 28, 2015, p.337, 339. Sutter also testified that the Decreed Storage Rights are no longer in priority after they have been deemed satisfied pursuant to the Accrual Methodology, Tr., Aug. 28, 2015, p.345, l.9-12, which is directly contrary to the Sisco affidavit's statements that "physical fill" determines when the Decreed Storage Rights are satisfied and no longer in priority. *See DC Response* at 10, 13 (paraphrasing and quoting Sisco affidavit).

Sisco's testimony at the hearing also undermined his affidavit. Sisco testified he was unsure if he remembered correctly how the Water District 63 accounting system accounts for flood control. Tr., Aug. 31, 2015, p.894, ll.4-5. Sisco stated that he did not understand some of the terminology and nuances associated with the computerized accounting, Tr., Aug. 31, 2015, p.905, ll.3-16, and that he did not understand "what this unaccounted for storage was." Tr., Aug. 31, 2015, p.906, ll.10-11. Sisco also testified he relied on water right accounting reports Cresto provided to him for purposes of water right accounting and water right administration. Tr., Aug. 31, 2015, p.940, ll.6-17.

The record thus belies the Ditch Companies' characterization of Cresto as "naïve" and unqualified to describe the operation of the accounting system or "assess the fit between [the

Department's] accounting system and reality." *DC Response* at 33. As the Director stated, "[d]uring the hearing, all parties relied on Cresto to explain the programming code, the 'green bar' sheets, and other accounting reports." A.R. 001410. Cresto's Staff Memorandum, affidavit, and testimony specifically explained the relationship between the Department's accounting system and the "realities" of the Boise River Basin's highly variable natural water supply, the Corps' flood control operations, the BOR's storage allocation practices, water users' diversions of natural flow and stored water, and the watermaster's duties. Ex. 1 at 000002-12; Ex. 2 at 000018-28; *see, e.g,* Tr., Aug. 27, 2015, pp. 80-106, 115-22, 129-71; Tr., Aug. 29, 2015, pp. 503-76, 587-631.[26]

In the contested case proceedings, no party challenged Cresto's educational credentials, technical expertise, and professional experience.[27] No party challenged Cresto's knowledge of

[26] Cresto had also previously prepared presentations for the water users to illustrate and explain the relationship between and among the Water District 63 accounting system, federal reservoir operations, and the natural water supply. *See e.g.*, Ex. 1019; Ex. 1020 (power point presentations).

[27] Cresto has a Bachelor of Science degree in Environmental Science and a Master's degree in Hydrology. Tr., Aug. 28, 2015, pp.70-72. Cresto is the Department's Hydrology section supervisor, and has been responsible for overseeing, running, and maintaining the Department's accounting systems and databases for Water District 63 (Boise River Basin) and Water District 65 (Payette River Basin), as well as interpreting and analyzing the accounting system outputs, since 2005. Ex. 2. At 000015; Tr., Aug. 27, 2015, pp.54-55.[27] Cresto trains Department staff on the accounting systems, works closely with watermasters, Tr., Aug. 27, 2015, pp.54-55, and "trains new watermasters on accounting operations and how to read the outputs." A.R.001268 n. 40. In her capacity as a Department Hydrologist, Cresto has done studies on current and historic hydrologic conditions in the Boise, Payette, Bear, and upper Snake basins, including analyses of historic watermaster reports ("Black Books"), historic water right accounting program code, and supporting water right data. Ex. 2 at 000015. In addition to preparing the Staff Memorandum for the contested case proceeding, Cresto also prepared a memorandum responding to Pioneer

the operation of the accounting system, or her ability to interpret and analyze historic accounting records and water distribution data. The Ditch Companies' sole basis for attempting to discredit Cresto in this appeal is the assertion that when she assumed responsibility for the accounting system twelve years ago, she had "no prior education, training, or experience in water rights accounting," and "[t]here was no manual for her to follow." *DC Response* at 33. These assertions in no way undermine Cresto's professional and technical expertise, experience, and qualifications for purposes of the contested case proceeding.[28] The Ditch Companies' attempt to discredit Cresto is also hypocritical in light of the fact that like all other parties, they relied on Cresto to explain the structure and operations of the accounting system, and to interpret its printed reports. A.R. 001410.

For the same reasons, there is no merit in the Ditch Companies' argument that this Court should adopt the Ditch Companies' self-serving narrative that the Department lacks "institutional knowledge" of the Water District 63 accounting system and/or federal flood control operations.

Irrigation District's interrogatories to the Department seeking "an analysis of 104 years of data regarding whether water rights junior in priority to the reservoir water rights had diverted during the "'Refill Period,'" as that term was defined by Pioneer Irrigation District. A.R. 001404, 000315; Ex. 3.

[28] The record belies the Ditch Companies' implied assertions that "water right accounting" is taught in college courses, and that Cresto received no training in the accounting system. Cresto testified that she was not aware of any college that offers classes in "water right accounting," and that she was trained by Department personnel familiar with the accounting system. Tr., Aug. 27, 2015 pp. 71-72, 74. The Ditch Companies also mischaracterize Cresto's testimony when they incorrectly imply that two deputy attorneys general guided preparation of the Staff Memorandum. *DC Response* at 31-32. Cresto testified that for purposes of drafting the Staff Memorandum she consulted with and received information from Department and Water District 1 staff, and only "reviewed" the memorandum with attorneys. Tr. Aug. 27, 2015, pp. 123-27.

DC Response at 30. Contrary to the Ditch Companies' argument, the purpose of developing a record in the contested case proceeding was not to remedy the Department's alleged lack of knowledge, but rather "to inform the water users of how the existing system works." A.R. 000338. As the Director stated, "SRBA proceedings and filings in this case establish there is a lack of understanding of how the existing system works," and "[w]ithout a record explaining how water is counted/credited to the reservoirs at issue under existing methods and procedures, the water users will not be able to identify the concerns or objections they have to the existing system." *Id.*

In summary, the Director's factual findings are supported by substantial and competent evidence. The Irrigation Organizations' reliance on selected testimony in no way undermines the requirement that the Director's findings must be accorded deference in this appeal.

B. THE IRRIGATION ORGANIZATIONS' ARGUMENTS THAT THE UNACCOUNTED FOR STORAGE METHODOLOGY IS CONTRARY TO LAW LACK MERIT.

1. The Unaccounted for Storage Methodology Is Consistent With This Court's *ICL* Decisions.

In the Boise River Basin, flood waters arrive early in the year, and are gone by the time the summer heat begins in earnest. After that, the natural flow supply is fully appropriated and insufficient to satisfy all needs. A.R. 001236, 001278. While the flood flows of spring can contain large volumes of excess water,[29] these flows are inherently difficult to appropriate

[29] "Excess water" is "water that has not been decreed." *A&B Irr. Dist. v. ICL*, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997). Flood years are, by definition, years of "excess water." The Irrigation Organizations do not dispute this. They simply argue that federal flood control

because of their seasonal nature, and significant year-to-year variation in runoff volume and timing. *Id.*

This runoff pattern is not unique to the Boise River Basin. To the contrary, it is common in Idaho. *See, e.g.*, *State v. ICL*, 131 Idaho 329, 331, 955 P.2d 1108, 1110 (1998) ("The term "excess" water refers to the fact that during spring runoff, the flow in Reynolds Creek is high, and the creek contains more water than can be used. However, later in the year, the flow becomes nearly nonexistent."). The use and administration of "excess water" is also common in Idaho. *See id.* (referring to "historic practices in the Reynolds Creek Basin regarding 'excess' water."); *A&B Irr. Dist. v. ICL*, 958 Idaho at 417, 958 P.2d at 574 ("Administration of 'excess' water is a longstanding practice in Idaho.") (Silak, J., concurring and dissenting).

This Court's *ICL* decisions answer the question of whether a water right holder can divert and use excess flows so long as no other water user is injured. In *State v. ICL*, this Court considered a "historic practice" regarding "'excess' water" pursuant to which water users diverted "more water than that permitted by their respective water rights." *State v. ICL*, 131 Idaho at 331, 955 P.2d at 1110. The "historic practice" had been "used successfully for decades," but lacked "the statutorily required elements" and therefore "does not establish the right to use excess water." *Id.* at 334, 955 P.2d at 1113. This Court approved continuation of the "historic practice" as described in a "general provision" because, while it did "not set forth a

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operations rather than Idaho water rights should govern the Director's determinations of which flows are "excess water."

water right in 'excess' water, it does describe a procedure by which those who have water rights may use 'excess' water[.]" *Id.*[30]

In the "companion case" of *A&B Irr. Dist. v. ICL*, this Court held that the term "excess" water flow "inherently relates to water that has not been decreed," and "is not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right." *A&B Irr. Dist. v. ICL*, 131 Idaho at 416, 958 P.2d at 573. "Consequently," this Court held, "there cannot be a prior[ity] relation in excess water." *Id.* This obviously did not mean that "excess" water is immune from appropriation, but rather referred to the same principle upon which this Court relied in *State v. ICL*: that a "historic practice" involving the use of "excess" water is not entitled to priority protection in the absence of a decreed water right setting forth "the statutorily required elements." *State v. ICL*, 131 Idaho at 131 Idaho at 334, 955 P.2d at 1113.

The "Unaccounted for Storage Methodology" is consistent with these "excess" flow principles. It is undisputed that there is a "'longstanding' and 'historic' practice of the diversion of excess water into the dams for use by the irrigators" in flood control years. R. 001066-67. But the volume of "excess" water physically captured in the reservoirs under this "historic practice" is "not subject to definition in terms of quantity of water per year, which is essential to

[30] The Department recommended in the SRBA proceedings on the BOR's beneficial use-based claims for "supplemental" storage water rights that a "general provision" be decreed describing the historic use of floodwaters captured in evacuated reservoir space in the Bose River Reservoirs. *See* Addendum at Tab 6. The Director also recognized in the contested case proceeding that a "general provision" would provide formal recognition of the historic practice. A.R. 001298, 001308.

the establishment and granting of a water right," *A&B Irr. Dist. v. ICL*, 131 Idaho at 416, 958 P.2d at 573, because it is entirely dependent on the Corps' flood control operations. Further, the so-called "reservoir operating plan" and the *Water Control Manual* are not referenced in the Decreed Storage Rights, and do not set forth "the statutorily required elements" of water rights. *State v. ICL*, 131 Idaho at 131 Idaho at 334, 955 P.2d at 1113. The Unaccounted for Storage Methodology is consistent with this Court's *ICL* decisions because the Unaccounted for Storage Methodology recognizes the historic practice of allowing excess flows to be stored and used ancillary to existing water rights without administering these practices as if they were decreed water rights with fixed quantities and protectable priority dates.

2. The Unaccounted for Storage Methodology Is Consistent With the Doctrine of Maximizing Beneficial Use and Minimizing Waste.

This Court recently re-affirmed that "the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho." *IGWA*, 160 Idaho at 131, 369 P.3d at 909. This is a "bedrock" principle of Idaho water law. This Court has repeatedly stated that "'the Idaho Constitution and statutes do not permit waste,'" *id.* at 131, 369 P.3d at 909 (quoting *AFRD2 v. IDWR*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007)), and that in this arid State, "'the greatest use must be had from every inch of water in the interest of agriculture and home building.'" *Id.* at 133, 369 P.3d at 911 (quoting *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P.752 (1907)).

The Unaccounted for Storage Methodology is consistent with these principles. While there is excess flow early in the season during flood control years, this is a short-lived state of

affairs. After the flood flows have ended and summer begins in earnest, stored water is essential to supplement the fully appropriated and steadily diminishing natural flow supply. Allowing the reservoirs to "refill" with excess water as the flood risk subsides prevents wasting storable flood water. This promotes beneficial use and prevents conflicts between Idaho water law and federal flood control operations.

3. The Unaccounted for Storage Methodology Is Necessary to Resolve the Priority Administration "Conundrum" and "Dilemma" Consistent With the Prior Appropriation Doctrine.

The Director stated that "reservoir system operations seek to physically fill or 'refill' the system at the end of the flood control season, and assume that the storage physically in the system at the end of the flood season is available for allocation to storage spaceholders following the conclusion of flood control operations." A.R. 001293. There is no real dispute on this point. "Refill," in short, is not separate or distinct from federal flood control operations. "Refill" *is* a federal flood control operation. *Opening Brief* at 14. The Irrigation Organizations admit this. *See, e.g.*, *DC Response* at 38 ("When peak flows come, flood control requires *filling* the reservoirs to protect the Boise Valley from potentially catastrophic flooding.") (italics in original).

However, as the Director found and the District Court agreed, there are no licensed or decreed water rights for the water the Corps captures during the flood control "refill" period. R. 001058-67. Indeed, it is for that very reason that the Water District 63 accounting system identifies "refill" water as "unaccounted for storage." There are also no water rights authorizing

federal flood control operations;[31] no flood control administration remarks in the Decreed Storage Rights; and under Idaho Code §§ 42-201, 42-602, 42-607, and 42-1417, the Director may not (and as a practical matter cannot) make priority distributions to the BOR's SRBA claims, because they have not been decreed as "water rights" with "the statutorily required elements."[32] *State v. ICL*, 131 Idaho at 334, 955 P.2d at 1113; *see BWI-17*, 157 Idaho at 394, 336 P.3d at 801 ("The decrees give the Director a quantity he must provide to each water user in priority."); *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) ("it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion").

[31] The Ditch Companies are incorrect in asserting that flood control is categorically excluded from the statutory requirement of obtaining a water right to authorize the diversion of water. Idaho Code § 42-201(2). Contrary to the Ditch Companies' assertion, Sisco's affidavit and the hearing testimony of former Department Director Tuthill do not create an exemption to Idaho Code § 42-201(2). *DC Response* at 10. Indeed, two flood control water rights were licensed during Tuthill's tenure as Director. Attached hereto in the Addendum at Tab 1 are true and correct copies of the two licenses.

[32] Idaho Code § 42-1417 allows the SRBA District Court to authorize "interim administration of water rights" during a general stream adjudication, but the SRBA District Court's order for interim administration in Basin 63 did not authorize the Director to distribute water to pending claims. Attached hereto in the Addendum at Tab 2 is a true and correct copy of the SRBA District Court's *Order Granting State of Idaho's Motion for Interim Administration of Decreed Surface Water Rights in Basin 63* (Feb. 22, 2011). The SRBA District Court's *Final Unified Decree* and *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* also did not authorize the Director to distribute water to pending claims. Attached hereto in the Addendum at Tab 3 and Tab 4, respectively, are true and correct copies of the text of the SRBA's *Final Unified Decree* (Aug. 26, 2014) and *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* (Aug. 26, 2014). The Department requests that this Court take judicial notice of these documents pursuant to I.R.E. 201.

Thus, as the Director found and the District Court agreed, federal reservoir operations create a "conundrum" or "dilemma" for priority administration of water rights. R. 001164-65; A.R. 001261 n.32, 001291. The Water District 63 accounting system resolves the priority administration "conundrum" or "dilemma" through the combined operation of the Accrual Methodology and the Unaccounted for Storage Methodology[33]:

> The Water District 63 accounting system accommodates these assumptions and operates in a manner consistent with the priority administration of the reservoir water rights. Following "paper fill," [*i.e., the Accrual Methodology*] the Water District 63 accounting system anticipates and allows for physical storage in the reservoir system of excess natural flow, i.e., flows in excess of downstream water demand that would cause flooding if not captured in the reservoirs. [*i.e., the Unaccounted for Storage Methodology*]. By tracking the additional storage as "unaccounted for storage" rather than attributing it to the storage water rights, the Water District 63 accounting system avoids violating the rights' decreed priorities and quantities. Moreover, including the "unaccounted for storage" in the annual volume calculated to be available for (or already used by) storage spaceholders on the "day of allocation" is consistent not only with coordinated reservoir system operations, but historic allocation practices as well.

A.R. 001293 (bracketed italics added).

The Unaccounted for Storage Methodology is integral to the Water District 63 accounting system's framework for resolving the priority administration "conundrum" or "dilemma" created by the Federal Government's failure to seek a water right for flood control purposes. The Unaccounted for Storage Methodology is also valid under Idaho law—indeed it is ***necessary***

[33] The Board of Control's assertion that prior to this appeal the Department had never distinguished the "Accrual Methodology" from the "Unaccounted for Storage Methodology," *BPBOC Response* at 14, 28, is contrary to the record. The Department explained to the District Court, in considerable detail, the factual and legal differences between "unaccounted for storage" and "accruals" to the Decreed Storage Rights. R. 000477-82, 000497, 000500, 000518-20, 001090-001110.

under Idaho law. The Unaccounted for Storage Methodology ensures that control of unappropriated water remains in the hands of the State rather than being ceded to the Federal Government. *See* Idaho Code § 42-101 ("its control shall be in the state"); *see also In re Snake River Basin Water System*, 115 Idaho 1, 5-6, 764 P.2d 78, 82-83 (1988) (holding the legislature may not delegate to the United States the State's authority to determine the scope of a state water rights adjudication).

Despite the Irrigation Organizations' hyperbole, this is not part of a nefarious plan to deprive Spaceholders of their storage water and dole it out "to future and junior users." *BPBOC Response* at 4. To the contrary, the Department's accounting system *accommodates* the Corps flood control operations and the BOR's practice of allocating all the water in the reservoirs to Spaceholder storage accounts in a manner consistent with the state's bedrock policy of maximum use. A.R. 001293, 001295, 001296, 001297-98, 001305.

4. The Irrigation Organizations' Interpretation of Idaho Code §§ 42-201(2) and 42-351(1) Is Contrary to the Plain Language and Would Require Water to Be Wasted.

The Director found that the Water District 63 accounting system has been operating since 1986 and has never resulted in shortfall in the Irrigation Organizations' storage water supply. A.R. 001275, 001285. Yet, now the Irrigation Organizations assert the Water District 63 accounting system is illegal. They argue Idaho Code §§ 42-201(2) and 42-351(1) prohibit the storage of excess flood water. *BPBOC Response* at 24; *DC Response* at 54. These arguments read into the statutes a limitation which is not present and thus are not consistent with the statutory language nor the facts in this case.

Idaho Code § 42-201(2) provides that "[n]o person shall divert . . . without having obtained a valid water right, or apply it to purposes for which no valid water right exists." Idaho Code § 42-351(1) provides that "[i]t is unlawful for any person to divert or use water . . . without having obtained a valid water right[.]" These statutes thus prohibit water users from diverting or using water *in the absence of a water right*, but neither statute prohibits persons *already holding valid water rights* from diverting in excess of their licensed or decreed quantities when flows surplus to needs under all water rights could be stored or used without injuring other water users. As discussed infra at Section B.1., it is common knowledge that the natural flow supply in many Idaho streams and rivers is highly variable and that, as this Court has stated, "[a]dministering a water right is not a static business." *A&B Irr. Dist. v. ICL*, 131 Idaho at 414, 958 P.2d at 57. To suggest that these statutes prohibit an existing water right holder from diverting or using excess water when doing so would not injure any other appropriator and the water would simply flow out of the system unused creates a conflict with the doctrine of maximum use. This Court should not adopt an interpretation of the statutes that unnecessarily creates a conflict with a bedrock principle of the prior appropriation doctrine as established by Idaho law. *See The David & Marvel Benton Tr. v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016) ("This Court will not read a statute to create an absurd result.").

Here it is undisputed that there are valid water rights to divert water to storage for irrigation purposes. As in *State v. ICL*, the diversion is not taking place in the absence of a valid water right but rather in excess of the Decreed Storage Rights. *See State v. ICL*, 131 Idaho at 331, 955 P.2d at 1110 (involving a historic practice of diverting "more water than that permitted

by their respective water rights."). This is because the diversion structures (the dams) necessarily divert all flows. Further, ancillary storage and use of the excess flows does not injure other appropriators, allows full allocations to Spaceholder storage accounts, and is consistent with the bedrock principle of maximizing beneficial use while minimizing waste. A.R. 001308.

The District Court did not hold, and the Irrigation Organizations have not argued, that the Director must prohibit the BOR and Corps from diverting and storing water identified as "unaccounted for storage," nor that the Director must prohibit the BOR from allocating that water to Spaceholder storage accounts. But that is what the Irrigation Companies' interpretation of Idaho Code §§ 42-201(2) and 42-351(1) would require if the statutes are interpreted as prohibiting those holding valid water rights from diverting when surplus water is available for diversion without injuring other appropriators.[34] Such an interpretation would be tantamount to requiring the waste of water, and is fundamentally at odds with the most basic principles of the prior appropriation doctrine. *See* *Stickney*, 7 Idaho at 435, 63 P. at 192 ("It is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state . . . ."); *IGWA*, 160 Idaho at 131, 369 P.3d at 909 ("'The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'"). If adopted, such an interpretation would have far reaching adverse impacts and would not be

[34] Such an interpretation presumably would also require the Department to prohibit the diversion, storage, regulation, and release of vastly greater volumes of water for flood control purposes, because there are also no water rights authorizing flood control operations at the reservoirs, and there are no "flood control" exceptions in Idaho Code §§ 42-201(2) and 42-351(1).

limited to storage water rights. Use of excess water by those holding water rights for direct diversions is common in Idaho and such a holding would cut off their ability to use excess flows.

5. The Irrigation Organizations' Arguments Fail to Distinguish the *ICL* Cases.

The Irrigation Organizations argue that this Court's *ICL* decisions do not support the Department's position that the Unaccounted for Storage Methodology is valid under Idaho law, because: (1) the *ICL* cases did not involve the question of "whether the historic use of so-called 'excess water' or 'high flows' ripened into vested and perfected water rights under the constitutional method of appropriation," *DC Response* at 63; (2) this case "does not involve the interpretation or application of a general provision," *id.*; and (3) ancillary use of "excess" flow by those already holding water rights is permissible only if it was decreed in a pre-SRBA water rights adjudication. *BPBOC Response* at 33. These arguments incorrectly characterize this case and the Court's *ICL* decisions.

a. This Appeal Does Not Raise the Question of Whether Historic Use of "Excess" Water Can Be Decreed as a Water Right.

The Irrigation Organizations argue the *ICL* decisions are not applicable because they did not involve the question of "whether the historic use of so-called 'excess water' or 'high flows' ripened into vested and perfected water rights under the constitutional method of appropriation." *DC Response* at 63. While it is true this question was not implicated in the *ICL* cases, it also is not implicated in this case.

This is a water distribution case involving an administrative proceeding under the IDAPA. As previously discussed, the Director may distribute water only to water rights that

have been licensed or decreed with the required elements. The question of whether the historic use of so-called 'excess water' or 'high flows' ripened into vested and perfected water rights under the constitutional method of appropriation," *DC Response* at 63, was not at issue in the contested case proceeding.

Further, the question of whether the BOR's SRBA claims for "supplemental" storage water rights had vested under the constitutional method of appropriation was beyond the Director's jurisdiction and authority. *See* *Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 118, 157 P.3d 610, 612 (2007) ("All claims arising within the SRBA are within the exclusive jurisdiction of the SRBA."); *see* *BWI-17*, 157 Idaho at 393, 336 P.3d at 600 (distinguishing "determining water rights, and therefore property rights" from "just distributing water"). For the same reasons, this question was outside the scope of the IDAPA judicial review proceedings from which this appeal arises, and is outside the scope of this appeal.[35]

Moreover, and contrary to the Irrigation Organizations' contentions, the Department agrees that "excess" water—that is, unappropriated water, or "water not required by any water right on the system," R. 001065—can be appropriated. *See* Idaho Const. Art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall

[35] The District Court rejected the Special Master's summary judgment analysis and recommendation in the SRBA proceedings on the BOR's claims, recommitted them to the Special Master, and denied the Ditch Companies' request for I.R.C.P. 54(b) certification of that decision. Attached hereto in the Addendum at Tab 5 is a true and correct copy of the SRBA District Court's *Order Denying Motion for I.R.C.P. 54(b) Certificate, Subcase Nos. 63-33732, et al.* (Jan. 6, 2017). The Department requests that this Court take judicial notice of this document pursuant to I.R.E. 201.

never be denied[.]"). But this does ***not*** mean that a water right has been perfected for the "historic practice" of "refilling" the reservoirs, or in "unaccounted for storage" as defined by the Water District 63 accounting system. The "refilling" of the reservoirs is governed entirely by the Corps' flood control decisions, which are "not subject to definition in terms of quantity per year, which is essential to the establishment of a water right." *A&B Irr. Dist. v. ICL*, 958 Idaho at 416, 958 P.2d at 573.

The teaching of this Court's *ICL* decisions is that "historic practices" involving the use of "excess" water must be reduced to water rights with administrable elements and decreed by the judiciary before they are entitled to priority protection. *See State v. v. ICL*, 131 Idaho at 334, 955 P.2d at 113 (distinguishing "the historical practice of using 'excess water' or' high flows'" from "the right to use excess water.").[36] The BOR's claims for "supplemental" storage water rights with a 1965 priority for water stored during the "refill" period of flood control operations require proof of how much of the "refill" water was actually applied to beneficial use in that year. *See Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604 ("Under the constitutional method of appropriation, appropriation is completed upon application of the water to the beneficial use for which the water is appropriated."); *City of Pocatello v. Idaho*, 152 Idaho 830, 841, 275 P.3d 845,

[36] The District Court appears to have incorrectly equated a "'longstanding' and 'historic' practice" of filling the reservoirs during the flood control "refill" period with a water right that is entitled to priority protection. *See, e.g.*, R. 001163 ("Treating the refill water as 'unaccounted for storage' does not result in protecting the historical practice of allowing the United States to continue to refill the reservoirs without a water right."). This Court's *ICL* decisions disposed of any notion that "historical practices" of "excess" water are entitled to priority protection or stand on the same footing as water rights.

856 (2012) ("When one diverts unappropriated water and applies it to a beneficial use, the 'right dates from the application of the water to a beneficial use.'") (citation omitted).[37]

The BOR's claims for beneficial use-based "supplemental" storage water rights may be decreed if the BOR and the Irrigation Organizations carry their evidentiary burden of proving in the SRBA how much of the "supplemental" storage water the BOR has claimed was actually applied to beneficial use in 1965.[38] Despite the Ditch Companies' mischaracterization of a small

[37] "Refill" and "unaccounted for storage" do not establish how much of the "supplemental" storage water claimed was actually applied to beneficial use. "Refill" and "unaccounted for storage describe only the storage of water in the reservoirs, and reservoir "storage" alone is not a measure of beneficial use. *See* *Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604 ("There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities."); *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 209, 157 P.2d 76, 81 (1945) ("Respondent operating company merely diverts, conveys, stores and distributes, it does not as such apply any water to a beneficial use, nor do the constituent organizations in the other reservoirs[.]"). Irrigation use takes place far downstream from the reservoirs, on "lands serviced by the irrigation districts." *Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604. Further, water stored in the year claimed may not have been used in that year, and/or may have been released for flood control purposes at the end of the season, or in subsequent years. A.R. 001240 ("to the extent the volume of carryover exceeds an applicable system flood control space requirement, the excess water will be evacuated for flood control purposes").

[38] The three beneficial use-based claims together assert "supplemental" storage water rights to a total of more than six million acre-feet, with a priority date of September 30, 1965. The total runoff of the Boise River in 1965—a very high water year—was approximately three and half million acre-feet. The Department was unable to quantify beneficial use under the "supplemental" storage water right claims and therefore recommended to the SRBA District Court that the claims be disallowed, but also recommended that a general provision be decreed recognizing the historic practice of using floodwaters captured in evacuated reservoir space. Attached hereto in the Addendum at Tab 6 is a true and correct copy of the Director's Report for the claims, which was filed in the SRBA on December 30, 2012. The Department requests that this Court take judicial notice of this document pursuant to I.R.E. 201.

portion of Cresto's testimony, *DC Response* at 20, 61 (citing Tr. 8/28/15 594:19-596:7), that proof was not at issue, and was not offered or established, in the contested case proceeding.[39]

b. Prior Decrees Had No Bearing on This Court's *ICL* Decisions.

The District Court distinguished this Court's *ICL* decisions on grounds they involved excess flow provisions adjudicated in pre-SRBA decrees. R. 001066. The Board of Control relies on the same distinction. *BPBOC Response* at 33. This Court, however, did not decide the *ICL* cases on the basis of the prior decrees or *res judicata*, even though those questions were raised. To the contrary, this Court explicitly decided the *ICL* cases on other grounds without even reaching these questions. *See State v. ICL*, 131 Idaho at 335, 955 P.2d at 1114 ("we need not reach the additional issue of whether *res judicata* or collateral estoppel principles require that the Reynolds Creek Decree be included in the SRBA decree.").

In *State v. ICL*, this Court effectively held that a "historic practice" of ancillary use of "excess" water by those holding valid water rights is permissible under Idaho law, ***regardless*** of whether such use had been recognized in a prior decree. *State v. ICL*, 131 Idaho at 333-35, 955 P.2d at 1112-14. The Unaccounted for Storage Methodology is based on the same principles. It tracks the storage of "excess" water—which the District Court correctly defined as "water not

[39] Counsel for the Ditch Companies generally asked Cresto whether she had a "view" as to whether "refill" water had historically been delivered to Spaceholders, and Cresto answered that she "believed" that it had. Counsel did not ask, and Cresto did not testify, as to data or conclusions regarding how much "refill" water had actually been applied to beneficial use in 1965. Tr., Aug. 28, p.595, ll. 5-9, p. 595, l.24-p.596, l.7. Further, when subsequently asked "do you know in any given year whether that actual water was put to beneficial use," Cresto responded, "I don't know that." Tr. Aug. 28, 2015, p.632, ll.13-24.

required by any water right on the system." R. 001065. The BOR and the Irrigation Organizations already hold valid water rights, the storage and use of "unaccounted for storage" does not injure any other appropriators, and is ancillary to the Decreed Storage Rights. *See* A.R. 001296 ("The coordinated system of flood control operations, in short, is based on substituting flood water for previously stored irrigation water released during flood control operations."); R. 001163 ("Historically, the United States has been refilling the reservoirs to satisfy its contractual obligations to the spaceholders to compensate for obligatory flood control releases."). This approach does not violate the Decreed Storage Rights, does not injure the Irrigation Organizations, and promotes the maximum beneficial use of the resource while minimizing waste. A.R. 001267-71, 001293-98, 001304, 001308.

c. This Court's *ICL* Decisions Were Not Based on "General Provisions."

While the *ICL* cases arose in the procedural context of reviewing "general provisions," this Court's substantive analysis was based on distinguishing "the historical practice of using 'excess water' or' high flows'" from "the right to use excess water." *State v. ICL*, 131 Idaho at 334, 955 P.2d at 113; *A&B Irr. Dist. v. ICL*, 958 Idaho at 416, 958 P.2d at 573. This distinction was based on the fundamental principle that priority only extends to a firm and fixed quantity of water as decreed by a court, *see, e.g*, *Van Camp*, 13 Idaho at 208, 89 P. at 754 (holding that a senior appropriator "may unquestionably" assert priority over the decreed quantity of water, "but beyond that he cannot go under any other pretext"), and the actual evidence of the historic use of "excess" water in the *ICL* cases. The Irrigation Organizations are incorrect in asserting that this

Court's *ICL* decisions are inapplicable simply because they were made in in the procedural context of considering "general provisions."

6. The Irrigation Organizations' Definition of "Excess" Water Is Based on Federal Flood Control Operations Rather Than Idaho Law.

The Irrigation Organizations argue that the *ICL* decisions do not apply because, in the Boise River Basin, the only "surplus," or "excess," or "unappropriated" waters are those released by the Corps for flood control purposes. *BPBOC Response* at 3 & n.1, 6, 12, 27, 33, 38; *DC Response* at 42, 62. Under Idaho law, however, "excess" water is "water that has not been decreed." *A&B Irr. Dist. v. ICL*, 131 Idaho at 416; 958 Idaho at 573. Idaho water right decrees govern the determination of whether water is "excess," "surplus," or "unappropriated." Further, the Director may not make determinations of what flows are and are not appropriated based on reservoir operations that modify the natural runoff regime. This Court has held that the Director must distribute water based on how "the same would have naturally flowed in the stream prior to the construction" of the reservoir. *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 396, 283 P. 522, 526 (1929). The Irrigation Organizations' definition of "excess" flow is contrary to Idaho law and when reduced to its essence is just another contention that federal flood control decisions should govern the use, distribution, and development of Idaho's water.

7. The Maximum Use Doctrine and the Director's Duty To Distribute Water Are Not Limited to Times of Scarcity.

The Irrigation Organizations also argue that the Unaccounted for Storage Methodology is invalid because the Director's authority to distribute water, and the maximum use doctrine, are limited to delivery calls in times of water "scarcity" or to conjunctive management delivery calls.

BPBOC Response at 33-34, 36; *DC Response* at 43, 54-55. This argument relies on the passage in Idaho Code § 42-607 authorizing watermasters to regulate or curtail junior diversions "when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others." Idaho Code § 42-607. It also relies on cases addressing conjunctive management delivery calls.

The Irrigation Organizations' arguments take the statute far beyond its plain language and mischaracterize this Court's holdings. Nothing in Idaho Code § 42-607 or this Court's decisions limit either the maximum use doctrine or the Director's duty to distribute water to times of "scarcity." The maximum use doctrine is the foundation of Idaho's prior appropriation doctrine, which includes, but is not limited to, Idaho Code § 42-607 and the Conjunctive Management Rules. This Court has held that the Conjunctive Management Rules recognition of the maximum use doctrine "merely restate[s] a broader understanding of Idaho law," *IGWA*, 160 Idaho at 132, 369 P.3d at 910, and that "[t]he governmental function in enacting not only I.C. s 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Nettleton*, 98 Idaho at 91, 558 P.2d at 1052.

Further, as this Court recognized in Basin-Wide Issue 17, the Director's "clear legal duty" and "broad power" to distribute water in accordance with the prior appropriation doctrine arises under Idaho Code § 42-602, not Idaho Code § 42-607. *BWI-17*, 157 Idaho at 393, 336 P.3d at 800. Another statute in Chapter 6 of Title 42 authorizes the Director to determine when "there is a necessity for the distribution and control of the waters of the [water] district." Idaho Code § 42-608(2), (3).

This Court has recognized that the Director's statutory duty and authority to direct and control the distribution of water in water districts is not limited to times of "scarcity." This Court held in 2009 that "[n]othing in the Idaho Code suggests that a water district may only be created when necessitated by conflict or scarcity." *In re IDWR Amended Final Order Creating Water District No. 170*, 148 Idaho at 211, 220 P.3d at 329. "In fact," this Court held, "efficient distribution of water, in accordance with the legislative mandate, requires that [the Department] implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users." *Id.* (underlining added). The plain language of Idaho Code and this Court's decisions disprove the Irrigation Organizations' contention that the Director lacks authority to distribute water or administer water rights outside times of "scarcity" or in the absence of a delivery call.

The Ditch Companies' related argument that "water right accounting does not distribute water" asserts that Idaho Code § 42-607's curtailment language means "distributing" water is limited to "controlling diversions," while "the accounting system is 'after-the fact accounting or tabulation of what happened'" that "does not influence the operation of the reservoirs to store water for beneficial use." *DC Response* at 43-44.[40] This argument lacks merit because, as

[40] The accounting programs are tools the Director uses in fulfilling his clear legal duty to distribute to distribute water in accordance with the prior appropriation doctrine. A.R. 001264, 001265 n.35, 001411 n.7.

discussed above, the curtailment provisions of Idaho Code § 42-607 are just one part of water distribution and water rights administration under Idaho Code.[41]

Moreover, the fact the Federal Government has physical control of the diversion works, i.e., the dams, does not exempt the Federal Government's water rights from priority administration, nor does it suspend the Director's clear legal duty to distribute water in accordance with the prior appropriation doctrine. Idaho Code § 42-602. The District Court also recognized this distinction. *See* R. 001060 ("While the Director distributes priority water to the dams pursuant to the reservoirs water rights, it is the federal government that decides how to store and release that water.").

Further, the Department's accounting of distributions of "priority water" to the Decreed Storage Rights cannot be dismissed as a "virtual world" exercise with "no impact" on "the administration of water rights in the real world." *DC Response* at 16. The accounting system determines whether the Decreed Storage Rights are "in priority." This means the accounting system is crucial in determining whether the Federal Government and/or the Irrigation Organizations are entitled to seek curtailment of junior diversions pursuant to Idaho Code § 42-607.[42]

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[41] The Ditch Companies' related assertion that the Director's accounting should simply document the watermaster's distribution decisions, *DC Response* at 43, is incorrect for reasons previously discussed. *Supra*, page 21, note 23. The Director is the watermasters' supervisor, not the watermasters' secretary.

[42] The watermasters testified that they have relied on the accounting system and accounting reports for purposes for purposes of administering water rights. A.R. 001272-75; *see* A.R. 001272 ("The 'Storage Water' section of each of the Black Books during *[Sisco's]* tenure stated

8. There is No Merit in the Irrigation Organizations' Assertions That the Director Is Exercising Unfettered Discretion to Allocate Water Without Regard to Idaho Law.

The Irrigation Organizations also object to the Unaccounted for Storage Methodology on grounds that it is an attempt by the Director to act outside the law, and exercise "a roving commission to manage water as he sees fit," *BPBOC Response* at 22, "under the cloak of discretion and specialized expertise." *DC Response* at 35. These accusations are wholly without merit.

As discussed above, Idaho law allows for flows in excess of all water rights to be physically retained in the reservoirs during the flood control "refill" period, and for the subsequent allocation of that water to Spaceholder storage accounts. Moreover, requiring the "excess" water to be released simply because there is no water right in the "excess" water itself, or prohibiting its allocation to the Spaceholders, would be contrary to the maximum use doctrine, and tantamount to requiring that water be wasted. *Stickney*, 7 Idaho at 435, 63 P. at 192; *IGWA*, 160 Idaho at 131, 369 P.3d at 909.

Further, the Director does not determine when or how much "excess" water is retained in the reservoirs during the "refill" period of flood control operations. This is entirely governed by the Corps' operational decisions about how much reservoir space to evacuate, and when and at what rate "refill" will be allowed, as previously discussed. The fact the Director distributes water to downstream water rights after the Decreed Storage Rights have been satisfied is not an

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that '[t]he storage for *[year]* was figured using a computerized water right and storage accounting program . . . .") (italicized brackets added; other brackets in original).

exercise of discretion, but rather a requirement of the Director's clear legal duty to distribute water in accordance with the prior appropriation doctrine. Idaho Code § 42-602.

Moreover, once "excess" natural flow has been physically stored and reduced to "unaccounted for storage," the Director may not allow the "unaccounted for storage" to be called out of the reservoirs by junior water right holders, or by anyone seeking to establish a new appropriation. By definition, "unaccounted for storage" consists of water that would have flowed past Middleton and exited the system but for being captured in the reservoirs. *Opening Brief* at 27-28; Ex. 1 at 000004-05, 000009; Tr., Aug. 28, 2015, p.444, ll.9-17. In other words, "unaccounted for storage" is water that is no longer part of the unregulated natural flow supply within Water District 63. As a matter of Idaho law, the unregulated natural flow supply is the only water available for future appropriations or call by junior water right holders. *IDWR Appellants' Brief* at 57-58 (May 26, 2017); *see BPBOC Response* at 38 (agreeing that "once the water is stored, it is not subject to appropriation and juniors cannot call it from the reservoir"); *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 396, 283 P. 522, 526 (1929) ("appellant's storage right may be exercised so long as respondents have at their headgates, during the irrigation season, the amount of water to which they are entitled under their appropriations as if the same would have naturally flowed in the stream prior to the construction [of the reservoir]"); Idaho Const. Art XV § 3 ("The right to divert and appropriate the unappropriated waters of any ***natural stream*** to beneficial uses, shall never be denied[.]") (italics and underlining added); Idaho Code § 42-101 (". . . when flowing in their ***natural channels*** . . .") (italics and underlining added).

In addition, any applications for future appropriations are governed by the permitting and licensing provisions of Chapter 2, Title 42, Idaho Code, not the Water District 63 accounting system or the water distribution provisions of Chapter 6, Title 42, Idaho Code. The Director's *Final Order* does not assert otherwise, nor has the Department argued otherwise in this appeal or the underlying judicial review proceeding. To the contrary, the Department has argued that a case addressing objections to how the Director distributes water to decreed water rights is not the appropriate proceeding in which to address or decide the Irrigation Organizations' concerns about actual or potential applications for new appropriations. *Opening Brief* at 58.

Also out of place in a water distribution case are the Irrigation Organizations' arguments regarding permitting moratorium orders issued by the Department on grounds that portions of the Boise River Basin were or are deemed "fully appropriated." *See BPBOC Response* at 12 (citing Exs. 3002, 3003, 3004, 3005, 306, 3007, and 3008); *DC Response* at 4 (citing and also "IDWR's 1977 moratorium order"). Permitting moratorium orders apply in determining whether new permits should be issued, not in distributing water to decreed water rights.[43]

[43] Of note, the Irrigation Organizations mischaracterize the orders as establishing a blanket moratorium in the Boise River Basin. As former Director Tuthill testified: "The moratorium isn't 100 percent lock solid closure. There are opportunities under the moratorium to still appropriate water. And there are some exceptions under the moratorium if water can be shown to be available." Tr., Aug. 31, 2015, p. 692, ll.8-12. Further, a number of different moratorium orders and permitting memoranda have been issued over the years that may affect the Boise River Basin in some way, and several of those have been amended, as demonstrated by the exhibits cited by the Irrigation Organizations. Exs. 3002, 3003, 3004, 3005, 3006, 3007, 3008. The moratorium issue in the Boise River Basin is not as simple and straightforward as the Irrigation Organizations assert.

9. The Special Master Exceeded His Jurisdiction.

The Irrigation Organizations rely upon the Special Master's October 2015 recommendation regarding the BOR's claims for "supplemental" storage rights—which the District Court rejected in its entirety—to argue that the Director crossed the "red line" that divides the judicial function of determining water rights from the administrative function of distributing water. *DC Response* at 46. The District Court came to exactly the opposite conclusion, holding that the Special Master exceeded his authority and the jurisdiction of the SRBA by delving into administrative questions of distributing water to decreed water rights. *See Appendices to the Appellants' Opening Brief* (Idaho Supreme Court Docket No. 44677-2016) May 26, 2017), *Appendix 3* at 4 ("The Special Master exceeded the jurisdiction of the [SRBA] by ruling on the Director's accounting methodology.") (bold omitted.).[44]

In short, the "red line" was crossed by the Special Master, not the Director. The Special Master either misunderstood or ignored this Court's analysis and holdings in Basin-Wide Issue 17. *See BWI-17*, 157 Idaho at 394, 336 P.3d at 801 ("Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.").

The Special Master also based his holding on a limited summary judgment record—a few affidavits and the arguments of counsel. The Special Master did not have the benefit the

[44] Again, the District Court denied the Ditch Companies' request for I.R.C.P. 54(b) certification of this order. Addendum at Tab 5. The BOR's claims remain pending before the Special Master.

extensive testimonial and documentary record developed in the contested case proceeding. The Special Master also did not request any information or input regarding the accounting system from the Department—which pursuant to statute is the court's "independent expert and technical assistant" in the SRBA, but may not be a party to an SRBA proceeding. Idaho Code § 42-1401B(1)-(3). Further, the Special Master did not apply deferential IDAPA standards of review in considering the Irrigation Organizations' challenges to the Water District 63 accounting system.[45]

Even accepting for the sake of argument the Special Master's view that he was actually addressing a judicial question of "the nature of the existing storage rights," *DC Response* at 46 (quoting the Special Master's recommendation), he still impermissibly crossed a jurisdictional line. The District Court in its orders of reference to the Special Master did not refer the Decreed Storage Rights, only the BOR's claims for "supplemental" storage water rights. *See Olson v. IDWR*, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983) ("The order of reference to the special master did not authorize him to decide those issues. . . . . the special master was acting in excess of his authority. . . ."). The partial decrees for the "existing storage rights" had by then become "conclusive as to the nature and extent" of the Decreed Storage Rights, and are binding on the Director and all parties to the SRBA. *Final Unified Decree* at 7, 9, 13 (Addendum at Tab 3);

[45] *IDWR Respondent's Brief* at 58-60 (Idaho Supreme Court Docket No. 44677-2016) (Aug. 1, 2017).

Idaho Code § 42-1420.[46] The Special Master lacked authority and jurisdiction to address a question of "the nature of the existing storage rights," *DC Response* at 46, and by taking up such a question he exposed previously decreed water rights to collateral attacks, which "severely undermine[s] the purpose of the SRBA and create[s] uncertainty in water rights adjudicated in that process." *IGWA*, 160 Idaho at 128, 369 P.3d at 906.

10. The Irrigation Organizations' Arguments Would Undermine the BOR's Accountability Under State Law for Releasing Storage for Purely Federal Purposes.

The Board of Control argues that "the consequences will be dire" if the Unaccounted for Storage Methodology is upheld, because there would be "nothing to prevent downstream, out-of-state interests from asking a federal judge to require the federal reservoir operators to release or pass through that water [that has filled the reservoirs]," which would "undo all the good done in *Pioneer* [144 Idaho at 115, 157 P.3d at 609]." *BPBOC Response* at 40-41; *see id.* at 2-3 (similar). This argument is unavailing because nothing in this Court's *Pioneer* decision "prevents" downstream, out-of-state interests from asking a federal judge to require releases of water from the federal reservoirs. Moreover, the irrigators have an interest beyond a contractual interest in the "priority water." And, to the extent they are concerned that the excess water stored in the reservoirs as part of the federal flood control operations is not protected by a water right, this concern is not a consequence of the accounting system but rather a product of the Federal Government's decision not to seek a water right for its flood control operations.

[46] The SRBA also had not retained jurisdiction over the Decreed Storage Rights in the *Order Regarding Subcases Pending Upon Entry of Final Unified Decree*. *See* Addendum at Tab 4.

Further, accepting the Board of Control's argument would undermine *Pioneer* rather than re-affirm it. This Court's *Pioneer* holding established that the BOR, as holder of decreed storage water rights for the "rental, sale or distribution" of water for irrigation purposes, is accountable under Idaho constitutional and statutory law when water is released for federal purposes other than irrigation. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609; *see id.*at 114, 157 P.3d at 608 (quoting Idaho Const. Art. XV § 4 and Idaho Code § 42-915); *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.3d 943, 945 (1935) (stating that water impounded in a reservoir is "impressed with the public trust to apply it to a beneficial use").

The Board of Control's arguments would allow the BOR to shift its accountability under *Pioneer* to junior appropriators by curtailing them to make up for flood control releases, A.R. 001284, 001299, and to future appropriators by asserting the priorities of its water rights to block new appropriations, A.R. 001279--which would effectively reserve all unappropriated water to replace flood control releases. Federal flood control operations are not subject to state regulation, however, and whether a release nominally made for "flood control" purposes was actually necessary and/or was made for other federal purposes is generally beyond review in state courts. The Board of Control's arguments, if accepted, would nullify the accountability of the BOR under Idaho law for releasing water stored for irrigation purposes authorized under state law, and open the door to releases for virtually any federal purpose under the rubric of "flood control."

11. Filling the Reservoir Is a Question of Operational Decisions, Not Water Rights.

The Irrigation Organizations characterize this appeal as a question of "reservoir fill," *BPBOC Response* at 3, 13, 28, and as presenting this Court with "three possible outcomes" for filling the reservoirs. *DC Response* at 3, 21, 24. These assertions mischaracterize the issue. As previously discussed, this is a water distribution case. The issue is distributing water in accordance with the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602.[47]

Filling the reservoirs in flood control years is a question of operational decisions, not water rights. The Decreed Storage Rights already encumber sufficient volumes of water to fully fill the reservoirs, and it is undisputed that the Decreed Storage Rights and the Water District 63 accounting system do not dictate, control, or govern reservoir operations. The reservoirs fill in flood control years only if and when the Corps in consultation with the BOR allows them to fill, A.R. 001306, and as previously discussed, their flood control decisions are made outside of state regulation.[48]

[47] The issue in the pending SRBA proceedings on the BOR's claims for beneficial use-based "supplemental" storage rights also is not "reservoir fill," but rather how much of the claimed "supplemental" storage water was actually applied to beneficial use under the claimed priority. That volume may or may not be sufficient to fully fill or "refill" the reservoirs in any given flood control year.

[48] In the District Court proceedings on Basin-Wide Issue 17 the BOR asserted that "the outcome of this proceeding will have no effect on Reclamation's flood control operations." *Id.* at 0001213.

Deciding this appeal on the basis of "reservoir fill" would simply abandon Idaho's prior appropriation doctrine as the basis for water distribution, and replace it with operational decisions made by the Corps and/or the BOR. It would also open the door to unintended consequences, because federal reservoir operations have never been the basis for distributing water in the past, and it is impossible to predict how they may change in the future.

C. THE UPPER SNAKE BASIN SETTLEMENT SUPPORTS THE DEPARTMENT'S POSITION IN THIS APPEAL.

The Irrigation Organizations assert the Department's position in this appeal "reeks of duplicity" and is "patently disingenuous" because the Department allegedly agreed to exactly the same type of "refill" water rights or administration in the Upper Snake Basin (Basins 1, 21, and 25) that the Irrigation Organizations seek in the Boise River Basin. *BPBOC Response* at 17, 20, 37-38; *DC Response* at 66-67. Aside from the fact that the Upper Snake Basin settlement was a compromise of disputed beneficial use-based "supplemental" storage water right claims and therefore not relevant to this appeal, the Irrigation Organizations misrepresent the settlement in their zeal to impugn the integrity of the Director and the Department.[49]

[49] The Upper Snake Basin settlement was the product of a "Stipulation" executed in 2015. Attached in the Addendum at Tab 7 is a true and correct copy of the *Status Report* that the United States filed in the SRBA in subcases 01-219 *et al*. in June 2016, and to which the United States attached a copy of the "Stipulation." All parties to the "Stipulation" except the United States executed it in January 2015. The United States had agreed to the "Stipulation" in principle, but had to await Department of Justice review and approval before executing the "Stipulation." The United States executed the "Stipulation" in November 2015. *Status Report* at 1. The Department requests that this Court take judicial notice of these documents pursuant to I.R.E. 201.

The Irrigation Organizations' assertion that the Upper Snake Basin settlement allows the BOR to "effectively control the river and determine when junior wrights can be exercised," *BPBOC Response* at 17, is contrary to the plain language of the partial decree attached to the Board of Control's brief. The partial decree expressly provides that "[f]or surface water rights administration this water right is ***subordinate*** to all water rights permitted, licensed, or decreed prior to May 1, 2014 that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code." Addendum B to *BPBOC Response* at 3 (third page of partial decree for water right no. 01-10621B) (italics and underlining added). Further, the fact that the partial decree expressly requires the BOR "to notify the watermaster to stop and start accrual of [the] storage water right," *BPBOC Response* at 17, also precludes federal control of the river, by preventing the BOR from asserting that the water right simply remains in priority without interruption, encumbering all flows, until the BOR decides to physically fill the reservoir.

The Irrigation Organizations also misrepresent to this Court that they seek nothing different than the Upper Snake Basin settlement. One of the cornerstones of the Upper Snake Basin settlement is that the signatories agreed that the Accrual Methodology and the "unaccounted for storage" would remain in place. Addendum at Tab 7 ("Stipulation" at 4 ¶ 9 & n.4). The Irrigation Organizations, in contrast, argue in this appeal (and in their related appeals) that the Accrual Methodology and "unaccounted for storage" are unacceptable and fundamentally contrary to Idaho law. These are but a few of the critical differences between the actual terms of Upper Snake Basin settlement and the Irrigation Organizations'

mischaracterizations of it, and why the Court should reject their arguments based upon the Upper Snake Basin settlement.

D. THE IRRIGATION ORGANIZATIONS HAVE NOT BEEN INJURED.

It is undisputed that the Irrigation Organizations have "never suffered a water shortage" as a result of the Water District 63 accounting system. A.R. 001285; *Opening Brief* at 3, 36, 40, 56-58. The Irrigation Organizations nonetheless argue they have been injured because: (1) the "longstanding" and "historic" practice of storing and using "refill" water must be "protected" by a water right so that the full volume of water physically held in the reservoirs at the conclusion of flood control operations is "secured" from calls by junior water right holders and from future appropriations, *BPBOC Response* at 4, 12, 16-17; *DC Response* at 1-2, 24, 26-27, 59-60; (2) the accounting system is a "unilaterally force[d] substitution" that re-characterizes water actually stored under the priorities of the Decreed Storage Rights as "permissive storage," *DC Response* at 53-57 & n. 9, thus "strip[ping] that [historic] practice of any legal protection," *BPBOC Response* at 30; and (3) the District Court determined that the BOR and the Irrigation Organizations hold fully vested beneficial use-based water rights in the "refill" water/"unaccounted for storage." *BPBOC Response* at 4-5, 35; *DC Response* at 1, 61, 63, 67, 70. None of these arguments withstand scrutiny.

1. The Absence of a Decreed Water Right Encumbering Water Identified as "Unaccounted for Storage," Is Not a Cognizable Injury.

There is no merit in the Irrigation Organizations' contentions that they have been injured because the longstanding and/or historic "practice" of "refilling" the reservoirs is not

"protected." As previously discussed, licensed and decreed water rights are entitled to priority "protection," while historic "practices" are not. *See* *State v. v. ICL*, 131 Idaho at 334, 955 P.2d at 1113 (distinguishing "the historical practice of using 'excess water' or' high flows'" from "the right to use excess water."). A historic "practice" must be reduced to a licensed or decreed water right with "the statutorily required elements" and be "subject to definition in terms of quantity of water per year" before it is protectable (or even administrable) on a priority-in-time basis. *Id.*; *A&B Irr. Dist. v. ICL*, 958 Idaho at 416, 958 P.2d at 573; *BWI-17*, 157 Idaho at 394, 336 P.3d at 801; *Nettleton*, 98 Idaho at 91, 558 P.2d at 1052.

The Director determined that there are no licensed or decreed water rights that encumber water the accounting system identifies as "unaccounted for storage," and the District Court agreed. In the absence of a licensed or decreed right the accounting system may not lawfully recognize any priority "protection" for the historic "practice" of storing and using "refill" water and/or "unaccounted for storage." This fact does not injure the Irrigation Organizations (or the BOR).

Further, the Director lacked jurisdiction over the BOR's SRBA claims for "supplemental" storage water rights, *Bray*, 144 Idaho at 118, 157 P.3d at 612 ("All claims arising within the SRBA are within the exclusive jurisdiction of the SRBA"), and the burden of proving the existence of any such water rights lies with the claimants, not the Director. Idaho Code § 42-1411(5); *see* *City of Pocatello*, 152 Idaho at 842, 275 P.3d at 857 ("Pocatello had the burden of proving its [constitutional method of appropriation] claim with definite evidence"). The fact that the Director made no determination of whether the Irrigation Organizations and the BOR have

acquired protectable water rights in "refill" water and/or "unaccounted for storage" did not injure the Irrigation Organizations (or the BOR).[50]

The Irrigation Organizations' argument that they are injured because no water right "secures" the full volume of water physically stored in the reservoirs at the end of flood control operations incorrectly assumes that junior and future appropriators are entitled to call "unaccounted for storage" out of the reservoirs. As previously discussed, once water has been removed from the unregulated natural flow supply and reduced to storage—regardless of whether it was "priority water" or "excess water" when initially diverted into the reservoirs—it may not be called from the reservoirs by junior appropriators or those seeking to establish new water rights. As previously discussed, they are entitled to call or appropriate only unregulated natural flow.[51]

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[50] The Director's SRBA recommendation that the BOR's claims be disallowed and that a general provision be decreed was not at issue in the contested case proceeding that gave rise to this appeal, because it only addressed questions of distributing water to previously decreed water rights. *See* *BWI-17*, 157 Idaho at 393, 336 P.3d at 600 (distinguishing "determining water rights, and therefore property rights" from "just distributing water").

[51] The Board of Control concedes this point, but argues that "there still must be a right to store water." *BPBOC Response* at 39. The opportunistic storage of inherently variable quantities of excess flood water cannot be reduced to a "water right," or at least not one with an enforceable priority. *See* *A&B Irr. Dist. v. ICL*, 958 Idaho at 416, 958 P.2d at 573 ("Excess flow is not subject to definition in terms of quantity per year, which is essential to the establishment of a water right."); *see* *id.* ("Consequently there cannot be a prior relation to excess water."). This is not to say that the BOR and/or Irrigation Organizations are precluded from establishing beneficial use-based "supplemental" storage water rights to "refill" water to the extent they are able to establish actual beneficial use of a specific volume of the "refill" water under the claimed priority. Rather, the point is that a right cannot be established based upon an accounting algorithm that is entirely governed by the Corps' flood control operations.

2. Assertions That New Appropriations Will Injure the Irrigation Organizations Must Be Resolved on a Case-by-Case Basis Pursuant to the Provisions of Chapter 2, Title 42, Idaho Code.

The Irrigation Organizations (and the BOR) also are not injured by the fact it may be possible, albeit unlikely, to perfect water rights in the remaining unappropriated flows of the Bose River Basin—i.e., high flows in flood years—that might interfere with the Corps' "refill" operations.[52] The possibility that flows excess to all existing water rights may be appropriated by new water rights at some future date is a fact of life under Idaho's prior appropriation doctrine. *See* Idaho Const. Art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied[.]"). Further, applications for new water rights must be submitted to the Department and perfected through the permitting and licensing procedures of Chapter 2, Title 42, Idaho Code. *See* *Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604 ("Since 1971 a party seeking a surface water right must file an application with the [Department], obtain a permit, and perfect that right by obtaining a license. I.C. § 42–

[52] The Director found that "[t]hese flood waters have remained unappropriated since coordinated reservoir operations began with Lucky Peak in the mid-to-late 1950s—approximately 60 years," and "have remained unappropriated because they are not dependable: some years are flood years, some are not, and even in flood years, the flood period ends relatively early in the year." A.R. 001278. The Director also found that any future appropriations "would likely be of such small quantities as to have few or no effects on the quantity of water available to 'refill' flood control space" and would benefit rather than interfere with the Corps' flood control operations. *Id.* The Director further found that while future storage projects "could conceivably appropriate a significant quantity of the 'refill' water," they also "would also add flood control capacity to the system and reduce the need for flood control releases from the existing reservoir system, which in turn would reduce the need to 'refill' in the first place." *Id.* "Moreover, the water users supported the concept of future storage projects, despite their concerns about future appropriations in the general sense." *Id.*

201, *et seq.*"). Any protest to a new water right application, including allegations "that it will reduce the quantity of water under existing water rights" or "that the water supply itself is insufficient for the purpose for which it is sought to be appropriated," Idaho Code § 42-203A(5), are addressed in the permitting and licensing process based on actual applications and concrete facts.

Distributing water to existing water rights is legally and factually distinct from resolving objections to new water right applications, and any such objections should be resolved on a fully developed record rather than by speculating about hypothetical injuries. The Board of Control simply confirms these points by incorrectly asserting that a pending application for a hydropower water right at Anderson Ranch Dam represents "imminent" injury. *See BPBOC Response* at 16-17, 39 (citing Addendum A to *BPBOC Response*).[53]

[53] The document attached by the Board of Control as Addendum A to its response brief is simply a summary of the application. A true and correct copy of the application, which is on file in the Department's Western Region Office, is attached hereto in the Addendum at Tab 8. The Department has not yet completed its review of the application in question, and the applicant has informally requested that the Department not process the application further at this time. It should also be noted that the applicant has expressly stated that "[t]his application is subordinate to first and second fill of existing reservoirs in the Boise River Basin." *Application* at 2 (Addendum at Tab 8). If and when the applicant chooses to move forward and the Department completes its review, the Department will issue public notice of the application as required by Idaho Code § 42-203A(1). Persons or entities such as the Board of Control that object to the application will be entitled to file formal protests and will have an opportunity to have their concerns heard by the Director, and the Director's decision will be subject to judicial review under IDAPA. *Id.* § (1)-(6). The outcome of those proceedings may result in denial of the application, or in a permit that is conditioned to address the concerns raised by the protests—including, potentially, "conditions limiting the use of the water to time when flood control is released from Lucky Peak Dam." *BPBOC Response* at 13. The Board of Control's assertions of injury are not yet ripe for administrative review, much less judicial review, and in any event are

3. The "Substitution" Is a Result of the Irrigation Organizations' Private Agreement With the BOR to Subordinate Their Storage Space Entitlements to Federal Flood Control Operations.

The Irrigation Organizations' assertion that they have been injured by a "forced" substitution of "permissive storage" for water that was actually stored under the priorities of the Decreed Storage Rights, *DC Response* at 53-57 & n. 9, is based on three incorrect premises. The first is that the Accrual Methodology is flawed and "priority water" actually consists of all water physically stored in the reservoirs at the conclusion of flood control operations, regardless of how much water the Corps previously released for flood control purposes.[54] The second incorrect premise is that the "historic practice" of storing and using unappropriated "refill" water is entitled to priority "protection." *See BPBOC Response* at 30-31 ("The Director wants to strip that [historic] practice of any legal protection."). The third incorrect premise is that the BOR's pending SRBA claims for "supplemental" storage water rights are entitled to be administered in priority as if they were decreed water rights.

The Irrigation Organizations' arguments mischaracterize their private agreements with the BOR to subordinate their storage space entitlements to the Corps' flood control operations, *DC Response* at 50-51, as something the Director has "forced" upon them. The record belies this

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not properly raised in an appeal addressing the distribution of water to existing water rights under Chapter 6 of Title 42, Idaho Code.

[54] Flood control releases are not limited to "evacuations." The Corps also releases water for flood control purposes in the form of "bypasses." "Bypass" releases predominate during the flood control "refill" period. A.R. 001243-44, 001407 & n.4.

argument. The Director determined that this voluntary agreement amounted to a "substitution" of water stored during the flood control "refill" period for stored water the Corps released during the "evacuation" period of flood control operations. *See* A.R. 001296 ("The coordinated system of flood control operations, in short, is based on substituting flood water for previously stored irrigation water released during flood control operations.").[55] The Irrigation Organizations' historian expert came to a similar conclusion, characterizing the "BOR's "Guarantee" in its 1954 Supplemental Contracts with Arrowrock and Anderson Ranch Spaceholders as "a sort of trade: extra water from Lucky Peak for the irrigators in exchange for allowing storage space in Arrowrock and Anderson Ranch to be used for flood control." Ex. 2053 at 001644.

The Director did not "force" this agreed-upon substitution of water, but rather determined that it "do[es] not violate the underlying water rights" and the accounting system is "consistent with this substitution[.]" *See* A.R. 001296-97 (citing and discussion *Bd. of Dirs. Of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943).) The fact that the Irrigation Organizations and the BOR—the co-owners of the Decreed Storage Rights—agreed to subordinate water storage to flood control also does not violate Idaho law. *See Idaho Power Co. v. State*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) (finding "nothing in the law of this state" precluded Idaho Power Company from voluntarily agreeing to subordination of its water rights). But that does not mean the private subordination/substitution agreement is binding on other appropriators. *City of Blackfoot*, 162 Idaho at 308-09, 396 P.3d at 1190–91.

[55] This determination was based on factual findings supported by substantial evidence in the record. A.R. 001242-49, 01276-77.

E. NO REMAND IS NECESSARY.

The District Court remanded this case to the Director for further proceedings on "the Director's determination that the United States and irrigators have not acquired a vested water right in water identified by him as unaccounted for storage." R. 001068. Contrary to the District Court's remand, however, the Director did not make any determination of whether the BOR and/or the Irrigation Organizations have "acquired a vested water right in the water identified by [the Director] as unaccounted for storage." *Id*. The Director simply determined that there are no licensed or decreed water rights encumbering the water identified as "unaccounted for storage."

Moreover, any determination of whether the BOR and/or Irrigation Organizations have established beneficial use-based water rights was beyond the Director's authority and jurisdiction, and remains beyond the Director's authority and jurisdiction. *Bray*, 144 Idaho at 118, 157 P.3d at 612; *Opening Brief* at 59-60. Thus, there is nothing for the Director address on remand. The Ditch Companies agree, and assert (correctly) that "any water rights ultimately decreed by [*sic*] in the Late Claims before the SRBA Court should be incorporated into the accounting system." *DC Response* at 68.

The Board of Control also recognizes "the SRBA court's jurisdiction" and that the SRBA must issue partial decrees quantifying any water rights that may be proven up in the SRBA before the Department can incorporate them into the accounting system. *BPBOC Response* at 41. The Board of Control nonetheless asserts a remand is necessary because the District Court held that "the 'unaccounted for storage' account violates Idaho law." *Id*. This argument does not support a remand, for two reasons.

First, the District Court's determination that "unaccounted for storage" is unlawful was based on the District Court's incorrect and unsupported characterization of "unaccounted for storage" as a "distribution" of water based on "historic practices" rather than water rights. R. 001058; *see* R. 001065 (holding that the "continued distribution" of water identified as "unaccounted for storage" violate Idaho Code § 42-201(2)). This characterization was contrary to the Director's factual findings and the substantial evidence upon which the Director relied, as previously discussed. *Opening Brief* at 40-44. "Unaccounted for storage" is defined as surplus natural flow that should have exited the system by flowing past Middleton, but did not. "Unaccounted for storage" is reported only when the measured flow at Middleton is less than the "remaining natural flow" predicted for Middleton by the accounting system. *Opening Brief* at 43; Ex. 1 at 000004-05, 000009; Tr., Aug. 28, 2015, p.444, ll.9-17. "Unaccounted for storage" is not a "distribution" but rather a natural flow parameter. It is a reliable proxy for the total amount of "surplus natural flow that could not be distributed to a water right" that was physically stored somewhere in the reservoir system during the "refill" period of flood control operations. *Opening Brief* at 23-24, 43-44. The District Court erred as a matter of fact and as a matter of law in characterizing this natural flow tracking function as a "distribution" of water within the meaning of Idaho Code § 42-602. *Id.* at 40-44.

For the same reasons, there is no merit in the Board of Control's argument that a remand is necessary because "the 'unaccounted for storage' account violates Idaho law." *BPBOC Response* at 41. In a river system fully regulated by three on-stream federal reservoirs, quantifying the unregulated natural flow supply is a prerequisite for the Director to perform his

"clear legal duty" under Idaho Code § 42-602 to distribute water in accordance with Idaho's prior appropriation doctrine. *BWI-17*, 157 Idaho at 393, 336 P.3d at 800; *see* *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho 157, 163, 219 P.3d 804, 810 (2009) ("When there is both natural flow and storage water in the river, the watermaster must determine the relative amounts of natural flow and storage water at the various diversion points on the river.")

The Board of Control's assertion that the District Court's remand would not require the Department to recognize open-ended, unquantified water rights, *BPBOC Response* at 38, is contrary to the plain language of the District Court's decision. The District Court defined "unaccounted for storage"—incorrectly—as a raw measurement of "excess natural flow entering the reservoirs after the reservoir water right is satisfied." R. 001065; *see* R. 001058 ("natural flow that continues to enter the reservoir"). This was a significant factual error that results in quantifying "unaccounted for storage" in volumes far exceeding the amounts actually calculated by the accounting system, because virtually ***all*** "excess" flows "enter" the reservoirs in flood years, while only a fraction are actually retained. The Department explained this problem in detail to the District Court, R. 001093-98, yet the District Court did not address it, and declined to alter its remand order. R. 001161-66. Thus, assuming the Board of Control is correct in asserting the District Court held that "the water in the 'unaccounted for storage account' should be protected," *BPBOC Response* at 37, the District Court's remand would indeed require the Department to "protect" ***all*** excess flood flows in each and every year. This would be tantamount to requiring the Department to recognize an unquantified, open-ended water right held by the Federal Government. *Opening Brief* at 50-52 & n.36.

F. THE IRRIGATION ORGANIZATIONS ARE NOT ENTITLED TO ATTORNEY FEES.

The Irrigation Organizations request awards of attorney fees and costs pursuant to Idaho Code § 12-117 and I.R.C.P. 54(d)(1). *BPBOC Response* at 41; *DC Response* at 68-71. Idaho Code § 12-117 authorizes an award of "attorney fees, witness fees, and other reasonable expenses" to the Irrigation Organizations if this Court finds that they are the prevailing party and that the Department "acted without a reasonable basis in fact or law." Idaho Code § 12-117. The Irrigation Organizations assert several grounds for concluding the Department acted without a reasonable basis in fact or law. None have merit, as discussed below, and I.R.C.P. 54(d)(1) has no application to this case.

The Irrigation Organizations argue that the plain language of Idaho Code §§ 42-201(2) and 42-351(1) prohibit the diversion, storage, or use of water without a water right, and the Department unreasonably interpreted these statutes by allowing water to be stored and used "without a water right." *BPBOC Response* at 41; *DC Response* at 69. As previously discussed, however, the Department's interpretation of the statutory language was not only reasonable, but consistent with Idaho's prior appropriation doctrine.

The plain statutory language prohibits diversion or use without a water right, but the BOR and the Irrigation Organizations have water rights. They are not diverting "without a water right," but diverting and using excess flood water ancillary to their decreed water rights. This Court has expressly recognized that Idaho law allows for the ancillary diversion and use of

excess water by those already holding water rights. *State v. ICL*, 131 Idaho at 333-35, 955 P.2d at 1112-14.

The Irrigation Organizations' interpretation of the statutes, in contrast, would require the Director to compel the waste of excess water that could be diverted, stored, and or applied to beneficial use by those already holding water rights. This interpretation conflicts with foundational principles of Idaho's prior appropriation doctrine. *See* *Stickney*, 7 Idaho at 435, 63 P. at 192 ("It is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state . . . ."); *IGWA*, 160 Idaho at 131, 369 P.3d at 909 ("'The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'") (citation omitted).

Further, Idaho Code §§ 42-201(2) and 42-351(1) had never been interpreted as requiring the Director to ignore these principles, to ignore the fact that "[a]dministration of 'excess' water is a longstanding practice in Idaho," *A&B Irr. Dist. v. ICL*, 958 Idaho at 417, 958 P.2d at 574 (Silak, J., concurring and dissenting), or as requiring the Director to flatly prohibit ancillary use of excess water by those already holding water rights. The Irrigation Organizations' new interpretation of the statutes presents a question of first impression, as the Ditch Companies concede. *DC Response* at 69. This Court has held in a number of cases that "[w]here issues of first impression are raised, attorney fees will not be awarded." *Saint Alphonsus Reg'l Med. Ctr. v. Ada Cty.*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009) (citing *Kootenai Med. Ctr. v. Bonner County Comm'rs*, 141 Idaho 7, 10, 105 P.3d 667, 670 (2004)).

The Board of Control argues "[w]ith respect to its excess flow argument, the Department asserts the same arguments on appeal as it did before the district court," without adding "new analysis and fail[ing] to respond to the district court's reasoned explanation." *BPBOC Response* at 41. These assertions are simply contrary to the record. The Department addressed the District Court's decision and explained why, in the Department's view, it was both factually and legally incorrect for the District Court to hold that the Unaccounted for Storage Methodology is contrary to law. This included significant discussion of the factual and legal aspects of the question of "excess flow."

The Ditch Companies argue the Department's position unreasonably conflicts with "the congressionally authorized operating plan." *DC Response* 69. There is no "congressionally-authorized operating plan" in the record, however. Other than authorizing construction of the reservoirs in the first place, the only "congressional" action in the record is the enactment of a 1954 federal statute authorizing the Secretary of the Interior "to coordinate his operation of the facilities of the [Boise] project with that of other Federal installations on the Boise and Payette Rivers." Ex. 2101 (68 Stat. 794). This statute did not approve, authorize, or reference an "operating plan," and there is nothing in the record suggesting that Congress was or is even aware of the *Water Control Manual*, much less that Congress specifically authorized or approved it.[56]

[56] The Corps prepares "water control manuals" for all of its reservoir projects pursuant to its general statutory and regulatory authority under federal flood control law. 33 U.S.C. § 709; *see* 33 C.F.R. § 222.5(f)(3) ("Water control plans developed for specific projects and reservoir systems will be clearly documented in appropriate water control manuals."). The fact that the

Further, as this Court held in Basin-Wide Issue 17, "the Director's duty to administer water according to technical expertise is governed by water right decrees," and "the decrees give the Director a quantity he must provide to each user ***in priority***." *BWI-17*, 157 Idaho at 394, 336 P.3d at 801 (italics and underlining added). As previously discussed, there is nothing in the partial decrees that authorizes the Director to disregard their priorities in favor of distributing water to the Decreed Storage Rights based on the so-called "congressionally authorized operating plan." Moreover, the Director found, and the District Court agreed, the Department is not a signatory to any of the federal agency agreements, storage contracts, or reservoir operation manuals that comprise the so-called "congressionally-authorized operating plan." R. 001063; A.R. 001238-41. While the Irrigation Organizations agreed to subordinate their storage space entitlements to the Corps' flood control operations, *DC Response* at 50-51, that private agreement is not binding on the Director or other appropriators. *City of Blackfoot*, 162 Idaho at 308-09, 396 P.3d at 1190–91.

In addition, the Ditch Companies' assertion that there is a "conflict" between the Department's position and the "congressionally authorized operating plan," *DC Response* at 69,

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Corps has prepared a "water control manual" for the Boise River Reservoirs is not noteworthy, and does not distinguish the Boise River Reservoirs from many other reservoirs operated by the Corps, or that are subject to the Corps' regulatory jurisdiction. *See, e.g.*, *A.O. Smith Corp.* v. *United States*, 774 F.3d 359, 362 (6th Cir. 2014) (discussing the Corps' "Water Control Manual" for "Old Hickory Reservoir"); *In re Operation of the Missouri River System Litigation*, 516 F.3d 688 (8th Cir. 2008) (discussing the Corps' "Missouri River Mainstem Reservoir Master Water Control Manual"); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1029 (8th Cir. 2003) (discussing 33 C.F.R. § 222.5 and "water control manuals"). While Arrowrock and Anderson Ranch are not Corps projects, the BOR and the Spaceholders specifically agreed that those reservoirs would also be operated in conformance with the *Water Control Manual.*

is contrary to the Director's factual findings. The Director found that the *Water Control Manual* "recognizes a distinction between state water right administration, and federal reservoir operations and contract administration," A.R. 001241, "does not state or imply that reservoir system flood control operations govern the distribution of water under state water rights and state law," "has not been interpreted as defining or governing water rights, water distributions, or priority administration," and that "state and federal officials have consistently viewed reservoir system flood control operations and state water rights administration in Water District 63 as distinct and separate matters." A.R. 001277. The Director's factual findings are supported by substantial evidence in the record and are binding in this appeal. *City of Blackfoot*, 162 Idaho at 306, 396 P.3d at 1188.

For similar reasons, there is no merit in the Ditch Companies' contention that it was unreasonable for the Department "to reject and ignore" the testimony and affidavits of Sutter and Sisco regarding "the creation of the accounting program and actual administration of the Boise River storage rights." *DC Response* at 70. As previously discussed, the Director considered the testimony and affidavits of both Sutter and Sisco, as well as a wide range of other testimony and documentary evidence, in making factual findings regarding "the creation of the accounting program and actual administration of the Boise River storage rights." *Id.*; *see* A.R 001249-63, 001271-75, 001403-08, 001423-30 (discussing same). In addressing these factual questions the Director often had to interpret and weigh technical evidence and testimony, draw inferences, and resolve evidentiary inconsistencies or conflicts. The Director's factual findings are supported by substantial evidence in the record, and the fact that the Ditch Companies have cited evidence in

Sisco's testimony and one of the three Sutter affidavits that supports their factual narratives and assertions does not mean the Director acted without a reasonable basis in fact or law. *City of Blackfoot*, 162 Idaho at 306, 396 P.3d at 1188; Idaho Code 67-5279(1); Idaho Code § 67-5279(3).

The Ditch Companies also assert "it has been a completely unreasonable position for [the Department] and the Director to continuously contend that there is no vested right in the water stored in the Boise River Reservoirs following flood control." *DC Response* at 70. This contention lacks merit because it attempts to inject into this water distribution proceeding a question of water right adjudication that was beyond the scope of the proceeding and the Department's authority and jurisdiction. It also completely mischaracterizes the Department's position.

This is a water distribution case, not a water rights adjudication proceeding. Distributing water and adjudicating water rights are two entirely different things. The Director does not, and may not, determine the nature or extent of claimed water rights when distributing water to existing water rights. *See Bray*, 144 Idaho at 118, 157 P.3d at 612 ("All claims arising within the SRBA are within the exclusive jurisdiction of the SRBA."). Disputed claims must be decreed before the Director is authorized (or even able) to distribute water to them on a priority-in-time basis. *See BWI-17*, 157 Idaho at 394, 336 P.3d at 801 ("The decrees give the Director a quantity he must provide to each water user in priority."); *Nettleton*, 98 Idaho at 91, 558 P.2d at 1052 ("it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion").

In this water distribution proceeding, the Director lacked authority to determine whether the BOR's SRBA claims for "supplemental" storage water rights represented vested water rights, did not make any such determination, and did not and has not taken a "position" that "there is no vested water right in the water stored in the Boise River Reservoirs following flood control." *DC Response* at 70. The Director simply determined that there are no water right licenses or decrees for those claims. The District Court agreed. That was the end of the inquiry for purposes of this water distribution proceeding. The question of whether the BOR and the Irrigation Organizations can carry their burden of proving how much of the "supplemental" storage water they have claimed was actually applied to beneficial use under the claimed priority (1965) is a legally and factually distinct issue that must be resolved judicially, in the SRBA.

The Department's position in this proceeding is simply that the "historic practice" of "refilling" the reservoirs is not contrary to Idaho Code and is not susceptible to priority administration because it is entirely determined by the Corps' flood control operations, and therefore is "not subject to definition in terms of quantity per year, which is essential to the establishment of a water right." *A&B Irr. Dist. v. ICL*, 958 Idaho at 416, 958 P.2d at 573; *see id.* ("Consequently there cannot be a prior relation to excess water."). Further, because "unaccounted for storage" as identified by the Water District 63 accounting system is the same thing as "refill" water, "unaccounted for storage" also is "not subject to definition in terms of quantity per year," *id.*, and also not susceptible to priority administration. But this position is not equal to saying it is impossible to perfect a beneficial use-based water right in the "refill" water

actually applied to beneficial use in 1965, provided actual beneficial use of the claimed "refill" water can be quantified.

The Ditch Companies also assert the Director acted without a reasonable basis in fact or law "by his biased and prejudicial conduct of the underlying Contested Case proceeding," which allegedly "violated the Ditch Companies' due process rights, and impugned the integrity of the contested case process." *DC Response* at 70. These allegations are baseless, as the District Court's decision confirms. The District Court rejected the same allegations, finding that the Ditch Companies "were provided with an impartial and disinterested tribunal," that the Director "properly, and more than adequately, considered [the Ditch Companies'] arguments," that "there is no evidence that the Director is or was biased against the Petitioners or their counsel personally," and that the Ditch Companies were in no way prejudiced by the Director's conduct of the contested case proceeding. R. 001068-73.[57]

The Ditch Companies are not entitled to an award of costs under Rule 54(d)(1) of the Idaho Rules of Civil procedure, *DC Response* at 68, even if they prevail in this appeal. Rule 54(d)(1) authorizes an award of costs by the "trial court." A district court in hearing a petition for judicial review of an decision of the Department does not act as a "trial court," I.R.C.P. 54(d)(1)(B), (C), (D), but rather acts in "an appellate capacity." *Idaho Power Co. v. IDWR*, 151

[57] The Department addressed the Ditch Companies' allegations that their due process rights were violated in the Department's response brief in the Ditch Companies' appeal. *IDWR Respondents Brief* at 77-98 (Idaho Supreme Court Docket No. 44677-2016) (Aug. 1. 2017). The Department incorporates herein its responses in that brief to the Ditch Companies' allegations of due process violations.

Idaho 266, 271, 255 P.3d 1152, 1158 (2011). Accordingly, I.R.C.P. 54(d)(1) does not authorize an award of costs in the appeal, or in the underlying judicial review proceeding.

Even if Rule 54(d)(1) did authorize an award of costs in this appeal or the underlying judicial review proceeding, the Ditch Companies failed to timely submit a Memorandum of Costs. Failure to file a Memorandum of Costs within 14 days of the entry of judgment "is a waiver of the right to costs." I.R.C.P. 54(d)(4).[58]

III. CONCLUSION

For the reasons set forth above, the Department respectfully requests that the Court reverse the District Court's conclusion that Idaho law does not allow a water right holder to divert excess water ancillary to a valid water right provided there is no harm to other appropriators. The Department also requests the Court to reverse the District Court's remand to the Director "for further proceedings" regarding "the Director's determination that the United States and irrigators have not acquired a vested water right in water identified by him as unaccounted for storage." R. 001068.

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[58] Judgment was entered on September 1, 2016. R. 001049.

RESPECTFULLY SUBMITTED this 8th day of September 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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